TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 185.

JOHN B. WHITCOMB, SURVIVING PARTNER OF THE FIRM OF MOSES P. WHITCOMB AND JOHN B. WHITCOMB, COPARTNERS AS WHITCOMB BROTHERS, ET AL., PLAINTIFFS IN ERROR,

vs.

JOHN E. WHITE AND ROBERTA B. WHITE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

FILED OCTOBER 2, 1907.

(20,874.)

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R TO THE SUPREME COURT OF THE STATE OF IDAHO.

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No. 1266.

In the Supreme Court of the State of Idaho.

JOHN E. WHITE and ROBERTA B. WHITE, Respondents,

vs.

S P. WHITCOMB and JOHN B. WHITCOMB, Copartners as Whitcomb Brothers; MOSES P. WHITCOMB and MARTHA WHITCOMB, Wife; JOHN REED and COURTNEY D. REED, His Wife; M. W. CALDWELL and ALICE CALDWELL, His Wife; JOHN FLEMING, —— CASEY, WILLIAM JOHNSTON and HILMA JOHNSTON, Wife; A. H. HASSELROTH and WILHELMINA HASSELROTH, His Wife; GEORGE PIATT and ELSIE PIATT, His Wife; ANDREW PAULSON and ALVENA PAULSON, His Wife; JOHN KIRKE, BROCKLIN DOUGHARTY and NORA DOUGHARTY, His Wife; LUKE COTTER and MIE COTTER, His Wife; WALTER FLEMING and ROSE FLEMING, Wife; CHARLES SCHINDLER, JASON EDWARDS and JULIA EDWARDS, His Wife; GORDON DOUGHARTY and IDA DOUGHARTY, His Wife; Mrs. EMMA LLOYD, ROY WHITCOMB and NANNIE WHITCOMB, His Wife; FRED L. JOHNSTON, JAMES CANNING and ANCHE CANNING, His Wife; JOHN B. WHITCOMB, FRANK LEN, and T. B. MCWILLIAMS, Appellants.

Transcript on Appeal.

Vol. I.

l from the District Court of the First Judicial District of the State of Idaho in and for the County of Kootenai.

ert Allen and John P. Gray, Attorneys for Appellants.
M. Stephens, Attorney for Respondents.

d this 14th day of Dec. 1906.

OLA JOHNESSE, *Clerk*,
By JNO. H. LONG, *Deputy*.

2-4 In the Supreme Court of the State of Idaho.

JOHN E. WHITE and ROBERTA B. WHITE, Respondents,

vs.

MOSES P. WHITCOMB and JOHN B. WHITCOMB, Copartners as Whitcomb Brothers; MOSES P. WHITCOMB and MARTHA WHITCOMB, His Wife; JOHN REED and COURTNEY D. REED, His Wife; M. W. CALDWELL and ALICE CALDWELL, His Wife; JOHN FLEMING, Mrs. —— CASEY, WILLIAM JOHNSTON and HILMA JOHNSTON, His Wife; A. H. HASSELROTH and WILHELMINA HASSELROTH, His Wife; GEORGE PIATT and ELSIE PIATT, His Wife; ANDREW PAULSON and ALVENA PAULSON, His Wife; JOHN KIRKE, BROCKLIN DOUGHARTY and NORA DOUGHARTY, His Wife; LUKE COTTER and SADIE COTTER, His Wife; WALTER FLEMING and ROSE FLEMING, His Wife; CHARLES SCHINDLER, JASON EDWARDS and JULIA EDWARDS, His Wife; GORDON DOUGHARTY and IDA DOUGHARTY, His Wife; Mrs. EMMA LLOYD, ROY WHITCOMB and NANNIE WHITCOMB, His Wife; FRED L. JOHNSTON, JAMES CANNING and BLANCHE CANNING, His Wife; JOHN B. WHITCOMB, FRANK ALLEN, and T. B. MCWILLIAMS, Appellants.

Transcript on Appeal.

Appeal from the District Court of the First Judicial District of the State of Idaho in and for the County of Kootenai.

Albert Allen and John P. Gray, Attorneys for Appellants.
H. M. Stephens, Attorney for Respondents.

5 Appeal from the District Court of the First Judicial District of the State of Idaho in and for the County of Kootenai.

JOHN E. WHITE and ROBERTA B. WHITE, Respondents,

vs.

MOSES P. WHITCOMB and JOHN B. WHITCOMB, Copartners as Whitcomb Brothers; MOSES P. WHITCOMB and MARTHA WHITCOMB, His Wife; JOHN REED and COURTNEY D. REED, His Wife; M. W. CALDWELL and ALICE CALDWELL, His Wife; JOHN FLEMING, Mrs. —— CASEY, WILLIAM JOHNSTON and HILMA JOHNSTON, His Wife; A. H. HASSELROTH and WILHELMINA HASSELROTH, His Wife; GEORGE PIATT and ELSIE PIATT, His Wife; ANDREW PAULSON and ALVENA PAULSON, His Wife; JOHN KIRKE, BROCKLIN DOUGHARTY and NORA DOUGHARTY, His Wife; LUKE COTTER and SADIE COTTER, His Wife; WALTER FLEMING and ROSE FLEMING, His Wife; CHARLES SCHINDLER, JASON EDWARDS and JULIA EDWARDS, His Wife; GORDON DOUGHARTY and IDA DOUGHARTY, His Wife; Mrs. EMMA LLOYD, ROY WHITCOMB and NANNIE WHITCOMB, His Wife; FRED L. JOHNSTON, JAMES CANNING and BLANCHE CANNING, His Wife; JOHN B. WHITCOMB, FRANK ALLEN, and T. B. MCWILLIAMS, Appellants.

TRANSCRIPT ON APPEAL.

Amended Complaint.

Come now the plaintiffs above named and file this, their amended complaint in said action, and for cause of action allege:

I.

That plaintiffs John E. White and Roberta B. White now are, and at all the times hereinafter mentioned were, husband and wife.

II.

at defendants Moses P. Whitcomb and John B. Whitcomb now nd at all the times hereinafter mentioned were co-partners do- usiness under the firm name and style of Whitcomb Brothers.

II*a*.

at defendants Moses P. Whitcomb and Martha Whitcomb now and at all the times hereinafter mentioned were, husband and

III.

at defendants John Reed and Courtney D. Reed now are, and l the times hereinafter mentioned were, husband and wife.

IV.

at defendants M. W. Caldwell and Alice Caldwell now are, and l the times hereinafter mentioned were, husband and wife.

V.

at defendant John Fleming now is single and unmarried.

V*a*.

at defendant Frank Allen now is single and unmarried.

V*b*.

at defendant T. B. McWilliams is now single and unmarried.

VI.

at defendant Mrs. —— Casey is now, and at all the times nafter mentioned was single and unmarried.

VII.

at defendants William Johnston and Hilma Johnston now are, t all the times hereinafter mentioned were, husband and wife.

VIII.

at defendants A. H. Hasselroth and Wilhelmina Hasselroth are, and at all times hereinafter mentioned were, husband and

IX.

at defendants George Piatt and Elsie Piatt now are, and at all hereinafter mentioned were, husband and wife.

X.

at defendants Andrew Paulson and Alvena Paulson now are t all the times hereinafter mentioned were, husband and wife.

XI.

That defendant John Kirke is now, and at all the times
8 hereinafter mentioned was, single and unmarried.

XII.

That defendants Brocklin Dougharty and Nora Dougharty now are, and at all the times hereinafter mentioned were, husband and wife.

XIII.

That defendants Luke Cotter and Sadie Cotter now are, and at all the times hereinafter mentioned were, husband and wife.

XIV.

That defendants Walter Fleming and Rose Fleming now are and at all the times hereinafter mentioned were, husband and wife.

XV.

That defendant Charles Schindler is now and at all the times hereinafter mentioned was, single and unmarried.

XVI.

That defendants Jason Edwards and Julia Edwards are now, and at all the times hereinafter mentioned were, husband and wife.

XVII.

That defendants Gordon Dougharty and Ida Dougharty now are, and at all the times hereinafter mentioned were, husband and wife.

9 XVIII.

That defendant Mrs. Emma Lloyd is now, and at all the times hereinafter mentioned was, single and unmarried.

XIX.

That defendants Roy Whitcomb and Nannie Whitcomb are now, and at all the times hereinafter mentioned were, husband and wife.

XX.

That defendants James Canning and Blanche Canning now are, and at all the times hereinafter mentioned were, husband and wife.

XXI.

That defendant John B. Whitcomb is now and at all the times hereinafter mentioned was, single and unmarried.

XXII.

That the plaintiffs now are, and at all the times hereinafter mentioned were, the owners in fee and entitled to the immediate and exclusive possession of the following described tract, piece and parcel of land, situate, lying and being in Kootenai county, Idaho, to-wit:

Northwest quarter of the southwest quarter and lots five (5) six (6) and seven (7) of section two (2), township fifty-five (55) north of range two (2) west Boise meridian.

XXIII.

That defendants are now wrongfully and unlawfully in possession of small portions of the tract above mentioned and described, and have used and occupied the same for a long period of time.

XXIV.

That said premises and property were acquired by plaintiffs by homestead entry, and final proof was made on the 27th day of November, 1897, and patent issued therefor on July 14th, 1903; that plaintiffs were unable to bring suit in ejectment against defendants or any other suit for possession of those portions of the premises above mentioned and described, occupied by the defendants or either of them, until patent issued because of contest and litigation pending in the land department of the United States, which was finally determined a few days before patent issued. But notwithstanding the said contest and litigation, plaintiffs are advised and believed that they have a right to recover of and from the defendants the reasonable value for the use and occupation of the premises by the defendants; that the reasonable value of the use and occupation of the premises occupied by the defendants is about two hundred fifty ($250) dollars per month for the premises and improvements thereon, and without the improvements at least seventy-five ($75) dollars per month, and that plaintiffs are entitled to recover such amount from the date of making their final proof, as they are advised and believe; that defendant Gordon Dougharty has moved from the premises above mentioned and described permanent and lasting improvements of the value of three thousand ($3000) dollars and more.

XXV.

That in truth and in fact, while plaintiffs were in the constructive and legal possession of the whole of the premises above mentioned and described when patent issued on the 14th day of July, 1903, the defendants are now in the physical and actual possession of small portions thereof.

XXVI.

That plaintiffs are entitled not only to the possession of the premises occupied by the defendants and each of them, but also to possession of the improvements upon the whole of the said property hereinbefore first described, and particularly the improvements upon the various portions above mentioned that the defendants and each of them occupy or have possession of.

XXVII.

That plaintiffs and their grantor were, and have been, seized and possessed of the property in question in this action within five years before the commencement of this action and on the 14th day of

July, 1903, when patent issued, defendants ousted plaintiffs
12 from the possession of portions of the premises above described.

Wherefore, Plaintiffs pray judgment against defendants:

1. For the recovery of the immediate and exclusive possession of the premises and property and improvements above mentioned and described, in the possession of defendants or either of them.

2. For $250 per month from November 27, 1897, for the use and occupation of said premises.

3. For separate judgment against defendant Gordon Dougharty for the sum of $3,000 for buildings removed by him as above set forth.

4. For their costs and disbursements herein.

STEPHENS & BUNN,
Attorneys for Plaintiff.

Duly verified.

Endorsed: Filed Dec. 18, 1903.

(Title of Court and Cause.)

Now comes the defendants in the above entitled action, by John P. Gray and Albert Allen, their attorneys, and demur to the amended complaint of the plaintiffs herein, and for grounds of demurrer specify:

1st. That there is a misjoinder of parties defendant in this: That it appears upon the face of the amended complaint that the defendants severally occupy distinct and separate parts or por-
13 tions of the premises described in the complaint; and that the defendants do not occupy any portion thereof jointly, and in said amended complaint the plaintiffs claim and demand judgment against all the defendants jointly for the sum of $250 per month, from November 27th, 1897, for use and occupation of the premises while it appears that defendants occupy small tracts in severalty and not jointly and one can not be held for the use and occupation of the others, and a cause of action against the defendants in ejectment and for the use and occupation is joined against the defendant Gordon Dougharty for wrongfully removing permanent improvements of the value of three thousand dollars ($3,000).

2nd. That several causes of action have been improperly united in said amended complaint in this. That it appears on the face of said amended complaint that the defendants severally occupied separate and distinct parts or portions of the land described in said amended complaint, and do not occupy any portion or part thereof jointly. And as also appears upon the face of said amended complaint, that the plaintiffs claim to recover of the defendants jointly two hundred and fifty dollars ($250) per month for use and occupation, whereas, said amended complaint shows that defendants occupy small parts or tracts in severalty and separately, and not jointly; and it also appears upon the face of said amended com-

plaint, that the cause of action in ejectment against all of the defendants, and a cause of action in tort against the defend-
14 ant Gordon Dougharty for removing lasting improvements upon the lands described in the complaint are improperly joined.

3rd. That said amended complaint is ambiguous, unintelligible and uncertain in this:

The amended complaint describes four certain tracts of land, viz., the northwest quarter of the southwest quarter, and lots 5, 6 and 7 of section two (2) township fifty-five (55) N. R. 2, E. B. M.; and then alleges that defendants are wrongfully and unlawfully "in possession of small portions of the tracts above mentioned," and does not specify or describe the small portions occupied by the defendants, or specify in which of the four tracts of land described the small portions occupied by the defendants are situated; and does not describe from what portion of the lands described in the amended complaint the defendant Gordon Dougharty removed permanent or lasting improvements, and does not describe what the improvements removed by Dougharty consisted of, nor whether taken from land occupied by the defendants, or which of the defendants, or whether the same was removed from land occupied by the plaintiffs. And the complaint states that the plaintiffs are entitled to the possession of the premises occupied by the defendants, and each of them, but does not show what portion or part is occupied by each of them or all of them, or does not show on what particular part occupied by
15 each of the defendants the improvements are which are claimed by the plaintiff. And the complaint alleges that the plaintiffs and their grantor were and have been seized and possessed of the property in question in this action within five (5) years before the commencement of this action, but does not state how they were seized or possessed. And alleges that when patent issued, defendants ousted the plaintiffs from possession of portions of the premises, but does not describe what portions; and the complaint infers at least that the plaintiffs are in possession of some portions of the premises, but does not describe what portions.

4th. Said amended complaint on its face does not state facts sufficient to constitute a cause of action against the defendants, or either of them.

JOHN P. GRAY AND
ALBERT ALLEN.
Attorneys for the Defendants.

Endorsed: Filed January 18, 1904.

Journal Entry, March 22, 1904.

The demurrer to the plaintiffs complaint herein, heretofore argued by counsel and taken under advisement by the court, came up for decision, and said demurrer was by the court overruled and the defendants herein were allowed 15 days from this date in which to file and serve their answer.

(Title of Court and Cause)

Answer and Cross Complaint.

Now comes John B. Whitcomb, Martha Whitcomb, John
16 Reed, and Courtney D. Reed, his wife, M. W. Caldwell and Alice Caldwell, his wife, Mrs. — Casey, William Johnston and Hilma Johnston, his wife, A. W. Hasselroth and Wilhelmina Hasselroth, his wife, George Piatt, his wife, Andrew Paulson and Alvena Paulson, his wife, John Kirke, Brocklin Dougharty and Nora Dougharty, his wife, Luke Cotter and Sadie Cotter, his wife, Walter Fleming and Rose Fleming, his wife, Charles Schindler, Jason Edwards and Julia Edwards, his wife, Gordon Dougharty and Ida Dougharty, his wife, Mrs. Emma Lloyd, Le Roy H. Whitcomb (sued as Roy Whitcomb) and Nannie Whitcomb, his wife, John B. Whitcomb, Frank Allen and T. B. McWilliams, and answering the complaint of the plaintiffs herein:

I.

Allege that since the commencement of this action, the defendant Moses P. Whitcomb died intestate, being at the time of his death a resident of the town of Clarks Fork, in the county of Kootenai, in the state of Idaho; and that the defendants Martha Whitcomb, wife of said Moses J. Whitcomb, and LeRoy H. Whitcomb (sued herein as Roy Whitcomb) are the sole and only heirs at law of said Moses P. Whitcomb, deceased, and that the defendant John B. Whitcomb is the surviving partner of said firm of Moses P. Whitcomb and John B. Whitcomb, co-partners as Whitcomb Brothers, and that the defendant, LeRoy H. Whitcomb, has been and is now the duly ap-
17 pointed special administrator of the estate of said Moses P. Whitcomb, deceased.

I*a*.

Admit each and all the allegations contained in paragraphs 1, 2, 2*a*, 3, 4, 5, 5*a*, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 and 21 of said amended complaint.

II.

Answering the allegations contained and set forth in paragraphs 22 and 23 of said amended complaint, defendants deny that they or either of them are now or ever have been in the possession of the following described portions of the premises described in said amended complaint, to-wit: lots five (5) six (6) and seven (7), section two (2), township fifty-five (55) north of range two (2), east of Boise meridian, and that part of the northwest quarter of the southwest quarter (N. W. ¼ S. W. ¼) of said section two (2) lying south of the right of way of the Northern Pacific railroad, and east of the county road, and defendants disclaim all interest therein, and deny that the plaintiffs or either of them are now or ever were the owners in fee or otherwise, or entitled to the immediate or exclusive possession or any possession of any part of the lands described in the

said amended complaint, except the said lots 5, 6 and 7, and that part of said northwest quarter of the southwest quarter (N. W. ¼ of S. W. ¼) lying south of the right of way of the Northern Pacific railroad and east of the county road.

18 Admit that defendants severally each for himself have used and occupied small portions of said northwest quarter of the southwest quarter (N. W. ¼ S. W. ¼) for a long period of time, but deny that they or either of them ever occupied or used any portion of said lots 5, 6 and 7 of that part of the said northwest quarter of the southwest quarter (N. W. ¼ S. W. ¼) lying south of the said right of way and east of the county road aforesaid.

III.

For answer to the allegations contained and set forth in paragraph 24 of said amended complaint, defendants admit that on the 27th day of November, 1897, the plaintiff John E. White in form made final proof in the United States land office for said premises described in said amended complaint, and admits that on July 14th, 1903, a patent in form issued therefor to the plaintiff John E. White; but defendants deny that by said final proof, or by said patent, or otherwise or at all, the plaintiffs or either of them, acquired the said northwest quarter of the southwest quarter (N. W. ¼ S. W. ¼) of said section two (2), township fifty-five (55) north of range two (2) east Boise Meridian, or any part thereof, or any right, title or interest therein or to any part thereof, and deny that plaintiffs or either of them were unable to bring suit in ejectment against defendants, or any other suit for possession of those portions of said premises occupied by defendants because of contest or

19 litigation pending in the land department of the United States, which was only finally determined a few days before patent issued, or that plaintiffs or either of them were at any time by any cause prevented from bringing such suit. Deny that plaintiffs or either of them have a right to recover of or from the defendants the reasonable or any value or amount whatever for the use or occupation of said premises, or any part thereof, by the defendants, or either of them. Deny that the reasonable value of the use or occupation of any of the said premises occupied by the defendants or either of them is about two hundred and fifty ($250) dollars per month for the premises and the improvements thereon, or any sum whatever; and deny that the reasonable value of the use and occupation of the portion of said premises, without the improvements thereon, occupied by the defendants, is the sum of seventy-five ($75) dollars per month, or any sum whatever; and deny that plaintiffs or either of them are entitled to recover any amount whatever for the use and occupation of said premises by the defendants or either of them from the date of making their final proof, or from any other date or at all.

IV.

Answering the allegations contained and set forth in paragraph 25 of said amended complaint, defendants deny that the plaintiffs or either of them were in the constructive or legal possession or any

possession of the said northwest quarter of the southwest
20 quarter (N. W. ¼ S. W. ¼) of said section two (2), when patent issued on the 14th day of July, 1903, or at any other time, excepting that portion thereof lying and being south of the Northern Pacific railway right of way, and east of the county road, containing about five and 94/100 (5.94) acres.

V.

Answering the allegations contained and set forth in paragraph 26 of said amended complaint, defendants deny that plaintiffs or either of them are or ever have been entitled to the possession of any portion of the premises described in said amended complaint, or the improvements thereon, except the said lots 5, 6 and 7, and that part of said northwest quarter of the southwest quarter (N. W. ¼ S. W. ¼) lying south of the right of way of the Northern Pacific railway and east of the county road, with the improvements thereon.

VI.

Answering the allegations contained and set forth in paragraph 27 of the said amended complaint, defendants deny that the plaintiffs or either of them, or their grantors, were or have been seized or possessed of any part of the property described in said amended complaint, within five years before the commencement of this action, or at any other time, excepting said lots 5, 6 and 7, and that part of said northwest quarter of the southwest quarter (N. W. ¼ S. W. ¼) lying south of the right of way of the Northern Pacific rail-
21 way, and east of the county road; and deny that defendants, or either of them, on the 14th day of July, 1903, when patent issued, or at any time, ousted plaintiffs or either of them from the possession of any portion or portions of the premises described in the said amended complaint.

VII.

Admit that the defendant Gordon Dougharty removed from the premises described in the complaint permanent and lasting improvements, but deny that the same was or is of the value of over three hundred ($300) dollars, but allege that the same were removed from the lots or parcels of land situated within the townsite of Clarks Fork, hereinafter in the cross complaint more particularly described, and which lot defendants allege have and had been held, occupied and improved by the said Gordon Dougharty, as one of the occupants of said townsite, ever since long before the plaintiffs or either of them ever made any claim to the land included in said townsite, and defendants allege that said permanent improvements had been made by and paid for by the said Gordon Dougharty, and were his own property, and he had perfect right to remove the same, and that plaintiffs had not and never had any interest therein.

For further answer to said amended complaint, and by way of cross complaint for affirmtaive relief against the plaintiffs, the defendants allege:

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22

I.

That in the year 1884, and while the premises were a part of the unsurveyed public land of the United States, and long before any settlement was made by the plaintiffs, or either of them, upon the lands described in the amended complaint, the part of the premises described in the amended complaint as the northwest quarter of the southwest quarter (N. W. ¼ S. W. ¼) of section two (2), township fifty-five (55), north of range two (2), east of the Boise meridian, was settled upon, occupied and appropriated and used as a townsite for townsite purposes, and for purposes of trade and business and not for agriculture, and was then and ever since has been called and known as the town of Clarks Fork. That the said town then contained, and ever since has contained, a population of about one hundred (100) inhabitants, and then contained, and ever since has contained a public railroad depot, a United States post office, hotels, saloons and residences. That said town was and is situated at the point where the Northern Pacific railroad crosses the Clarks Fork of the Columbia river, and at all times was and is the center of and the shipping and supply point of a large area of country in which a large business of lumbering, mining and farming was carried on; and that during all of said time large amounts of timber, lumber and other products of the country surrounding said town have continuously been shipped over said railroad from said town; and

23 that said town and said northwest quarter of the southwest quarter (N. W. ¼ S. W. ¼) has at all times been an important center of business and trade.

II.

That these defendants and each of them are now residents and occupants of said town, and they and their grantors and predecessors in interest have been residents and occupants of said town ever since long before the plaintiffs or either of them settled upon any of the lands described in said amended complaint.

III.

That on or about November 17th, 1890, and while the said land was a part of the unsurveyed lands of the United States, and at a time when the said northwest quarter of the southwest quarter (N. W. ¼ S. W. ¼) was occupied and used as a townsite and for purposes of business and trade, and not for agriculture, by these defendants and their grantors and predecessors, the plaintiff John E. White, who was then the station agent of the Northern Pacific Railway company at said town of Clarks Fork, claimed one hundred and sixty (160) acres of land lying south of the Northern Pacific railroad track and marked the boundaries thereof on the ground; and that thereafter in the year 1891, the said White erected thereon a dwelling house, and has with his wife ever since resided in said house. That said tract of one hundred and sixty (160) acres

24 so claimed by the plaintiff John E. White, and the boundaries marked upon the ground, included within its boundaries that part of what is now the said northwest quarter of the southwest quar-

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ter (N. W. ¼ S. W. ¼) of said section two (2) lying south of the right of way of said Northern Pacific railroad and east of the county road, containing five and 94/100 (5.94) acres, and that said plaintiff did not at any time prior to the 27th day of November, 1895, claim any portion of said northwest quarter of the southwest quarter (N. W. ¼ S. W. ¼) other than the said part thereof lying south of said right of way and east of the county road.

IV.

That the inhabitants of said townsite of Clarks Fork caused said townsite to be surveyed and laid out into lots, blocks, streets and alleys, by William Ashley, Jr., a competent surveyor, prior to the 22nd day of November, 1895, and caused a map or plat thereof to be made and certified to by said William Ashley Jr., and verified by Henry Melder, judge of the probate court of said Kootenai county.

V.

That on the 27th day of November, 1895, the plaintiff John E. White, with the intent to cheat and defraud the said town occupants, and to obtain title to the lots, buildings and improvements of said town occupants, including these defendants, made homestead entry for the lands described in the complaint, including the said
25 northwest quarter of the southwest quarter (N. W. ¼ S. W. ¼) of section two (2), falsely claiming that the same was unappropriated public lands, whereas in truth and in fact the said northwest quarter of the southwest quarter (N. W. ¼ S. W. ¼) was then and at all times since long prior to his settlement has been occupied as a town, and for purposes of trade and business, and not for agriculture, and the same was under the law appropriated as and for a townsite, and the same was not subject to entry under the preemption or homestead laws, or for any other purpose except as a townsite for the use and benefit of the occupants of said town.

VI.

That thereafter on the 8th day of January, 1896, the said Henry Melder, who was then the judge of the probate court, being the county court of the said county of Kootenai, state of Idaho, being the county in which said townsite was situated, duly elected and qualified as such judge, for and in behalf of the occupants of said townsite of Clarks Fork, filed in the United States land office at Coeur d'Alene, Idaho a protest and contest against said homestead entry of said John E. White, in so far as the same included said northwest quarter of the southwest quarter (N. W. ¼ S. W. ¼) of said section (2), so as aforesaid occupied as a townsite, the same being supported by his affidavit, and accompanied by the said map or plat of said townsite, a copy of which map or plat is
26 hereto attached and marked Exhibit "A," and hereby made a part of this answer and cross complaint. That thereafter a hearing was ordered to be had before the register and receiver of said land office, to determine the rights to said land, as between the said plaintiff John E. White and the said town occupants, and said

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hearing was had and held before said register and receiver, and evidence was adduced before them by both parties. That upon said hearing the said town occupants offered to show by competent evidence that the lands included in said townsite never were claimed by the plaintiff John E. White prior to the date of his making his said homestead entry on November 27th, 1895, and offered to show by competent evidence that the claim of the said John E. White as marked upon the ground, and as recorded by him in the county recorder's office of said county, did not include any portion of said townsite as surveyed and platted as aforesaid. But the said register and receiver overruled said offer, and refused to receive or consider such testimony.

That said register and receiver decided said contest in favor of said John E. White. That an appeal was taken from said decision to the honorable, the commissioner of the general land office, who affirmed the decision of said register and receiver, and that an appeal was taken from the said decision of said commissioner to the honorable secretary of the interior, who affirmed said de-
27 cision of the commissioner and awarded the said land, to wit: The northwest quarter of the southwest quarter (N. W. ¼ S. W. ¼) of said section two (2), to the said John E. White. That afterwards said secretary of the interior ordered a further hearing and additional testimony to be taken in said matter before said register and receiver, and in pursuance thereof further testimony was taken, and thereafter the honorable secretary of the interior finally decided said contest in favor of said John E. White, and awarded him a patent for the lands described in said amended complaint, including the said northwest quarter of the southwest quarter (N. W. ¼ S. W. ¼) upon which said townsite was situated, and including all the buildings and improvements of occupants of said town, including the buildings and improvements of the defendants, as well as the lands upon which the same were situated, and that the patent so issued to the plaintiff John E. White is the one mentioned in said amended complaint.

VII.

Defendants further allege that by the ruling and decision of the said register and receiver refusing to receive or consider said competent evidence offered on behalf of said town occupants, to show that prior to and up to the 27th day of November, 1895, the claim of said John E. White, as located and marked upon the ground, and as recorded by him, did not include any part of said townsite, was partial to said White and an erroneous decision of the law
28 applicable thereto, and greatly prejudiced the rights of said town occupants, including these defendants, and prevented these defendan*h*ts from a fair hearing.

VIII.

Defendants further allege that on said hearings and each of them the undisputed facts showed that the said lands upon which said townsite was situated were occupied and used as a townsite and for

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purposes of business and trade, and not for agriculture, to the extent as surveyed and platted and shown upon said map long before the plaintiffs or either of them ever settled or attempted to settle upon any of the lands described in the said amended complaint, and that by reason of the existance of said townsite thereon, and the occupancy thereof as for a townsite, and its occupancy and use for the purposes of trade and business and not for agriculture, the same was not at the time when said White made settlement, or at the time when said White made homestead entry thereof on the 25th of November, 1895, or at any time since subject to entry under the preëmption or homestead laws of the United States. Yet, notwithstanding the law and notwithstanding the facts the said register and receiver and the commissioner of the general land office and the secretary of the interior awarded said land to the plaintiff John E. White, and so doing they each and all held and decided that said land was subject to such entry under the homestead laws; but
29 which decisions of said officers and each of them, these defendants allege were erroneous and contrary to law, and defendants allege that by reason of said erroneous decisions of said officers and each of them, and the issuance of said patent to said John E. White under and pursuant to said erroneous decisions the said John E. White has wrongfully and illegally obtained the legal title to the said townsite as surveyed and platted as aforesaid, when in equity and good conscience and under the laws of the United States, a patent should have issued therefor to the said judge of said probate court in trust for the several use and benefit of the occupants thereof, according to their respective interests.

IX.

That these defendants are severally the equitable owners of and in the possession of the following described lots or parcels of said lands included within said townsite described according to said survey and plat, together with the buildings and improvements thereon, to wit:

The defendant, John B. Whitcomb, as surviving partner of the firm, Moses P. Whitcomb and John B. Whitcomb, late co-partners doing business under the firm name of Whitcomb Brothers:

Lots 1 and 2 block 10, Lots 6, 7, 8, 9, 10 and 13, block 5 and lots 7, 8, 9 and 10, block 8.

The defendants Le Roy H. Whitcomb and Martha Whitcomb as sole heirs at law of Moses P. Whitcomb, deceased, and Le
30 Roy H. Whitcomb as special administrator of the estate of Moses P. Whitcomb, deceased. Lot 3, block 10 and all of blocks 11, 12, 13, 14, 15 and 16.

The defendants, John Reed and Courtney D. Reed, his wife, lots 7, 8, 9 and 10, block 9, and lots 12, 13, 14 and 15, block 2.

The defendants M. W. Caldwell and Alice Caldwell, his wife, lots 5 and 6, block 9.

The defendants William Johnston and Hilma Johnston, his wife, lots 18, 19 and 20, block 4.

The defendants A. H. Hasselroth and Wilhelmina Hasselroth, his wife, lots 9 and 10, block 4, and lots 1 and 2, block 5.

The defendants, George Piatt and Elsie Piatt, his wife, lots 4, 5, 6, 7 and 8, block 4.

The defendants Andrew Paulson and Alvena Paulson, his wife, lots 6, 7, 8, 9, 10 and 11, block 2.

The defendant John Kirke, lots 8, 9, 10, 11 and 12, block 3.

The defendants Brocklin Dougharty and Nora Dougharty, his wife, lot 11, block 5.

The defendants Luke Cotter and Sadie Cotter, his wife, lot 12, block 5.

The defendants, Walter Fleming and Rose Fleming, his wife, lots 14 and 15, block 5.

31 The defendant, Charles Schindler, lots 3, 4 and 5, block 5.

The defendants, Jason Edwards and Julia Edwards his wife, lots 1 and 2, block 9.

The defendants, Gordon Dougharty and Ida Dougharty, his wife, lots 4, 5, 6, 7 and 8, block 10.

The defendant, Mrs. Emma Lloyd, lots 4, 5 and 6, block 8.

The defendant, John B. Whitcomb, lots 11, 12, 13, 14 and 15, block 4.

The defendant, Frank Allen, lots 1, 2, 3, 4, 5, 6 and 7, block 3, and lots 1, 2, 3, 4, 5, and 6, block 1.

The defendant, T. B. McWilliams, lots 16 and 17, block 5.

And they and their grantors and predecessors respectively have been in the possession of said respective plats or parcels of land ever since long prior to the settlement of the plaintiffs upon any of the lands described in the amended complaint; and defendants allege that they have at their own cost and by their own labor improved their said respective lots or tracts of land, and made lasting and permanent buildings and improvements, and that plaintiffs have contributed nothing to such improvements, and each of these defendants are respectively entitled to have a legal title to the lots or parcels of land so claimed, possessed and improved by them respectively,

32 free from any claim or demand of the plaintiffs, and defendants offer to pay to the plaintiff the price which he paid the government for lands included in said townsite as surveyed and described in said plat.

Wherefore the defendants pray the judgment and decree of this court as follows.

1st. That the plaintiffs take nothing by this action.

2nd. That the plaintiffs be adjudged and decreed to hold the legal title to the lands included within the limits of said townsite, to wit: The northwest quarter of the southwest quarter (N. W. ¼ S. W. ¼) section two (2), township fifty-five (55), north of range two (2), east of Boise meridian, except the part thereof lying south of the right of way of the Northern Pacific railroad and east of the county road, in trust for the several use and benefit of the occupants thereof, according to their respective interests, and adjudging and decreeing that the plaintiffs convey the same to the judge of the probate court of the said county of Kootenai in trust for the several use and benefit

of the occupants thereof, according to their respective interests. Or that the plaintiffs convey to each of the defendants respectively the several tracts or parcels of land occupied and claimed by them respectively as hereinbefore described; and that in the event of the plaintiffs neglecting or refusing to execute such conveyance or conveyances, the court appoint a commissioner with full power
33 to execute such conveyances and direct him to make the same.

3rd. That the defendants have such other and further relief in the premises as to the court may seem just and equitable, and that defendants recover of and from the plaintiffs their costs in this action.

JNO. P. GRAY AND
ALBERT ALLEN,
Attorneys for Defendants.

Duly verified.

Endorsed: Filed Nov. 6th, 1904.

(Title of Court and Cause.)

Demurrer to Cross Complaint.

Come now the plaintiffs above named, who are in fact the defendants in the cross complaint filed herein by the above named defendants, wherein the above named defendants are in fact plaintiffs, and demur to the cross complaint herein upon the following grounds, to wit:

I.

That the above named defendants, who are in fact and effect plaintiffs in said cross complaint, or either of them, have no legal capacity to sue.

II.

That there is a defect of parties in said cross complaint, that is, assuming the above named defendants to be plaintiffs in said
34 cross complaint, there is then a defect of parties plaintiff in said cross complaint, in that the probate judge of Kootenai county, Idaho, is not a party plaintiff in said cross complaint.

III.

That the said cross complaint does not state facts sufficient to constitute a cause of action against the plaintiffs in the original complaint, or against either of them

IV.

That the said cross complaint is ambiguous, unintelligible and uncertain in the following particulars, towit:

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1. By not setting forth whether or not the evidence mentioned in paragraph six (VI) as being refused by the register and receiver was required to be and in fact was allowed, taken down, reduced to writing and made a part of the record on appeal under the rules, regulations and practice of the interior department.

2. By not stating whether or not the commissioner of the general land office or the secretary of the interior upon the appeals considered all the evidence thus taken or of record.

3. By not setting forth or pleading any alleged fact or facts constituting the alleged fraud of plaintiffs mentioned in cross complaint.

H. M. STEPHENS,
Attorney for John E. White and Roberta B. White.

Filed Nov. 10, 1904.

35 (Title of Court and Cause.)

Order Overruling Demurrer.

Now on this day, the same being the fourth day of the regular November, 1904, term of the above named court, the above entitled action came on regularly for hearing upon the demurrer of the above named plaintiffs to the cross complaint of defendants John B. Whitcomb and others, filed herein, plaintiffs appearing by their attorney, H. M. Stephens, and said defendants appearing by their attorney, Albert Allen. After hearing said demurrer and the arguments of counsel, and the court, after and upon consideration thereof, being fully advised in the premises, it is by the court ordered that said demurrer be, and the same is hereby, overruled. To which ruling of the court the plaintiffs excepted, and said exception was allowed.

Done in open court, this 12th day of November, 1904.

R. T. MORGAN,
District Judge.

(Endorsed:) "Filed Nov. 12, 1904. T. L. Quarles, Clerk."

(Title of Court and Cause.)

Answer to Cross Complaint.

Come now plaintiffs, John E. White and Roberta B. White, and for answer to the cross complaint of the above named defendants herein:

36 I.

Plaintiffs deny that in the year 1884, or at any other time, or while the northwest quarter of the southwest quarter of section two (2), in township fifty-five (55) north, range (2) east of the Boise meridian, was unsurveyed, or before the settlement by plaintiffs or

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either of them upon said lands or any land, or while the same or any part thereof or any part of the premises described in the amended complaint were public lands, the said premises, or any part thereof, were settled upon, occupied, appropriated or used as a townsite or for townsite purposes or for the purpose of trade or business or any business except for agriculture; and deny that said premises or any part thereof in the year 1884, or at any other time, have ever been known as or called the town of Clarks Fork. Plaintiffs, however, admit that in the vicinity of said premises there was what was known as the town of Clarks Fork. Plaintiffs deny that in the year 1884 or at any other time said town contained about one hundred inhabitants or any inhabitant upon the land in controversy; and plaintiffs deny that in the year 1884 or at any other time there was ever upon the premises in controversy or any part thereof other than the right of way of the Northern Pacific Railroad company, any person or persons living upon or occupying said premises or any part thereof for trade except upon said right of way. Plaintiffs admit that since the year 1890 there has been a railroad depot on the right of way
37 of the Northern Pacific Railroad company where it passes upon, over and through the northwest quarter of the southwest quarter of said section two, and admit that since the year 1886 a United States postoffice has been maintained on said right of way until long after plaintiffs settled upon and occupied the said premises, and that thereafter said postoffice was moved from said right of way onto the lands involved in this action; and admit that hotels have been maintained on the land involved in this action since the year 1895; and deny that any postoffice, hotel, saloon or residence prior to the time the said land was occupied and claimed by the plaintiffs in this action was maintained upon said premises or any part thereof other than upon said right of way of said railroad. Plaintiffs deny that said town is situated at a point where the Northern Pacific railroad crosses the Clarks Fork of the Columbia river, but admit that it is not far distant from the place where said railroad crosses said river. Plaintiffs deny that at all times or at any time said town was a center of or the shipping or supply point of a large area of country in which a large mining, lumber or farming business was carried on. Plaintiffs, however, admit that some business was carried on in said town on the premises in controversy after the same were settled upon and claimed by the plaintiffs but not prior thereto, and allege that a portion of the business which was carried on in the vicinity of said town prior to settlement on said premises and claim thereto by the plaintiffs was upon land adjoining the land
38 in controversy in this action and on the right of way of said railroad. Plaintiffs deny that the northwest quarter of the southwest quarter of said section two has at all times or at any time been an important center of business or trade.

II.

Plaintiffs admit that defendants are residents in and about the said town of Clarks Fork, Idaho, and that they are occupying or claiming some portion of the premises in controversy in this action; and plain-

tiffs deny that the defendants or either of them or their grantors or grantor or predecessors or predecessor in interest have been residents or a resident or occupants or an occupant of said town ever since long before the plaintiffs or either of them settled upon the land described in the amended complaint or at any time or at all prior to the settlement upon and claim of the lands involved in this action, by the plaintiffs. And in this connection the plaintiffs allege that the defendants and each of them moved upon and commenced to claim said property or some part thereof long after the plaintiffs had settled thereupon and claimed the same.

III.

Plaintiffs deny that on or about the 17th day of November, 1890, or at any other time or at a time when the northwest quarter of the southwest quarter of said section two was occupied or used as a townsite or for the purpose of business or trade or not for agricul-
39 ture by the defendants or either of them or the grantors or grantor or predecessors or predecessor of the defendants or either of them, the plaintiffs or either of them claimed one hundred and sixty acres of land lying south of the Northern Pacific railroad track. Plaintiffs admit that in the year 1890 plaintiffs settled upon the northwest quarter of the southwest quarter of said section two, and in the year 1891 commenced the construction of a dwelling house on said premises, and shortly thereafter completed said building, and ever since have occupied the same. And in this connection plaintiffs allege that the claim mentioned in paragraph numbered three (III.) of said cross complaint was filed under a statute of Idaho, and was made when said land was unsurveyed and when all the business houses at or near said town of Clarks Fork were upon the right of way of said railway and before a survey was made and at all times on and after November 17th, 1890, the plaintiffs claimed the legal subdivision upon which the said dwelling and house were situated and constructed and occupied by the plaintiffs, and in accordance with which homestead entry was made. Plaintiffs admit that the claim so filed under said statute of Idaho included that portion of the northwest quarter of the southwest quarter of said section two lying south of the Northern Pacific railroad; and plaintiffs deny that they or either of them prior to the 17th day of November, 1895, did not claim any portion of the northwest quarter of the
40 southwest quarter of said section two other than the portion thereof lying south of said right of way and east of the county road.

IV.

Plaintiffs deny that the inhabitants of said townsite of Clarks Fork caused said alleged townsite to be surveyed or laid out into lots or blocks or streets or alleys by William Ashley, Jr., or any other person prior to the 22nd day of November, 1895. Plaintiffs admit that some of the persons claiming to be inhabitants of the alleged townsite of Clarks Fork caused a survey and plat to be made some time in November, 1895, the exact date being to plaintiffs unknown; and

admit that they caused said alleged plat to be certified by William Ashley, Jr., and verified by the probate judge of Kootenai county.

V.

Plaintiffs admit that on the 27th day of November, 1895, plaintiff John E. White made homestead entry for the land described in the amended complaint herein, including the northwest quarter of the southwest quarter of said section two. Plaintiffs deny that he so did with the intent to cheat or defraud the said alleged townsite occupants or any or either of them, or that he so did with the intent to obtain title to the lots or any lot, buildings or any building, improvements or any improvement of said alleged occupants or either of them including these defendants or either of them; and deny that plaintiffs or either of them falsely claimed the northwest
41 quarter of the southwest quarter of said section two was unappropriated public land; and deny that in truth or in fact the northwest quarter of the southwest quarter of said section two was then or at any subsequent time prior to the settlement of plaintiffs, or either of them had been occupied as a town or townsite or for purposes of trade or business or otherwise except for agriculture; and deny that the northwest quarter of the southwest quarter of said section two or any part thereof was under the law or otherwise or at all appropriated as or for a townsite; and deny that the same or any part thereof was not subject to preemption or entry under the homestead law or for any purpose except a townsite for the use or benefit of the alleged occupants or any alleged occupant of said town or townsite.

VI.

Plaintiffs admit that on the 8th day of January, 1896, Henry Melder, claiming to be probate judge of Kootenai county, Idaho, filed in the United States land office at Coeur d'Alene, Idaho, a protest and contest against said homestead entry of said John E. White in so far as the same included the northwest quarter of the southwest quarter of said section two; and deny that the northwest quarter of the southwest quarter of said section two or any part thereof was on said date or any date or ever had been occupied as a townsite; and plaintiffs admit that the said protest and contest was accompanied by an affidavit and the plat of which plat Exhibit "A" attached to the
42 cross complaint herein is a copy. Plaintiffs admit that thereafter a hearing was ordered to be had before the register and receiver of said land office to determine the rights of the plaintiff John E. White therein and thereto and the rights as between the said John E. White and the townsite claimants; and plaintiffs deny that the said claimants were townsite occupants; and plaintiffs admit that said hearing was had and held before said register and receiver, and all evidence offered or adduced was received by and before them; that is, all evidence offered for or on behalf of said probate judge and the said alleged townsite claimants and the said John E. White. Plaintiffs deny that upon said hearing or any hearing or otherwise or at all said alleged townsite occupants or claimants or any or either

of them offered to show by competent or any evidence that the land included in said alleged townsite never was claimed by plaintiff John E. White prior to the date of his making his said homestead entry on November 27, 1895; and deny that any one offered to show or did show by competent or any evidence that the claim of said John E. White as marked upon the ground or as recorded in the office of the recorder of said county or otherwise or at all did not include any portion of said alleged townsite as surveyed or platted by said townsite claimants as alleged in the cross complaint herein or at all; and plaintiffs deny that the said register and receiver or either of them overruled said offers or any offer by the said probate judge or
43 townsite claimants or any or either of them; and deny that the said register and receiver or either of them refused to receive or consider such or any other testimony.

Plaintiffs admit that said register and receiver decided said contest and protest in favor of said John E. White; and admit that an appeal was taken — said decision to the honorable commissioner of the general land office, who reversed said decision of said register and receiver, and that an appeal was taken from said decision of said commissioner of the general land office to the honorable secretary of the interior, who reversed the decision of the commissioner and affirmed the decision of the local officers, except as to two acres to be excluded from entry by plaintiff John E. White and the said secretary of the interior awarded all of the land embraced within the homestead entry of said John E. White to the said John E. White, which homestead entry included the northwest quarter of the southwest quarter of said section two. Plaintiffs admit that afterwards said secretary of the interior ordered a further hearing and additional testimony to be taken in said matter before said register and receiver, and in pursuance thereof further testimony was taken, and that thereafter said register and receiver held and decided adversely to said alleged townsite claimants and in favor of said John E. White, and an appeal was taken to the commissioner of the general land office, and the decision of the local officers was affirmed; and that there-
44 after an appeal was taken to the secretary of the interior, and the said decisions of the local officers and the commissioners of the general land office were approved and confirmed by the secretary of the interior, and a patent awarded and issued to said John E. White for the land described in the amended complaint herein, which included the northwest quarter of the southwest quarter of said section two; and admit that said patent also included all buildings and improvements of any and all the alleged townsite claimants as well as the lands upon which the same were situated, and that the said patent is the one mentioned in the amended complaint of the plaintiffs herein.

VII.

Plaintiffs deny that by the ruling and decision of the said register and receiver or either of them complained of by the defendants, or by the alleged refusal to receive or consider competent or any evidence offered or received on behalf of said alleged town occupants or townsite claimants so offered as defendants allege to show that

prior to and up to the 27th day of November, 1895, the claim of the said John E. White as located and marked upon the ground as alleged in said cross complaint or as recorded by him did not include any part of the alleged townsite or that the same was partial to the said White, or an erroneous decision of the law applicable thereto, or greatly or at all prejudiced the rights of said alleged town occupants or townsite claimants or any or either of
45 them or the defendants or any or either of them, or prevented defendants or either of them or said alleged townsite claimants or either of them from having a fair trial. And in this connection plaintiffs deny that said register and receiver or either of them refused to receive or consider any competent evidence offered on behalf of said probate judge or said alleged townsite claimants or either of them for any purpose; and deny that the decisions or any decision of said register and receiver or either of them or the decisions or any decision of the commissioner of the general land office or of the secretary of the interior or either of them was or were partial to said John E. White or inapplicable to the law, or that an erroneous decision of the law was made, or that any one was prejudiced by an erroneous decision of the law by any or either of said officers, or that any person was prevented from having a fair hearing or trial by any or either of said officers; but on the contrary the plaintiffs allege that the said probate judge and the said alleged townsite claimants were afforded and given every opportunity to present any and all evidence that they had or could produce, and that they did produce all the evidence they possibly could produce, and more evidence than the facts or the truth justified; and that the said probate judge or said alleged townsite claimants or any or either of them were never prevented from introducing any evidence whatsoever upon any issues made in or by the said protest or contest.

46 VIII.

Plaintiffs deny that on said hearings or any or either of them the undisputed facts or any facts or fact showed that the said lands or any part thereof upon which said alleged townsite was situated or any part thereof were occupied or used as a townsite or for purposes of business or trade or not for agriculture to the extent as surveyed and platted and shown upon said plat filed as aforesaid, or to any extent whatsoever, before the plaintiffs or either of them ever settled or attempted to settle upon the land described in the amended complaint; and deny that by reason of the existence of said alleged townsite thereon or any townsite thereon or the occupancy thereof as or for an alleged townsite or occupancy or use for the purpose of trade or business and not for agriculture or otherwise or at all, or for any reason whatsoever, the same was not at the time when said John E. White made settlement or at the time when said White made homestead entry thereof, on the 25th day of November, 1895, or on the 27th day of November, 1895, or at any other time or at all, the said premises or any part thereof described in said amended complaint or in the cross complaint herein was or were not subject to entry under the pre-emption or the

homestead laws of the United States; and deny that notwithstanding the law or the facts said register and receiver or the commissioner of the general land office or the secretary of the interior awarded said land to the plaintiff John E. White; and deny that the deci-
47 sion of said register and receiver or either of them or the commissioner of the general land office or the secretary of the interior or any or either of them was or were erroneous or contrary to law; and deny that by reason of said alleged erroneous decisions or any decision of said officers or any or either of them or the issuance of patent to said John E. White under and pursuant to said decisions or any decisions or decision of said officers or either of them or otherwise or at all said John E. White has wrongfully or illegally obtained the legal title or any title to the said alleged townsite or any part thereof as surveyed or platted, as alleged in said cross-complaint, or otherwise or at all; and deny that in equity or good conscience or under the laws or any law of the United States or otherwise or at all a patent should have issued for the said northwest quarter of the southwest quarter of said section two or any part thereof to or in the name of the said probate judge or to any person or persons in trust for the several use and benefit of the alleged occupants thereof or of either of them, according to their respective interests or any alleged interest of said alleged occupants or townsite claimants, or otherwise or at all issue or be issued except to plaintiff John E. White as his homestead under the laws of the United States. And in this connection the plaintiffs allege that the said patent issued as and in the manner authorized and required by law, and to the person entitled thereto, and after full and complete hearing of all matters involved in said protest or con-
48 test or that could be or become involved or contested in or under said protest and in said contest proceedings; and allege that all of the findings of fact in said protest and contest were and are in favor of the plaintiffs in this action and against said probate judge and alleged townsite claimants and the alleged townsite occupants.

IX.

Plaintiffs deny that the defendants or either of them are severally or at all the equitable or other owners or owner, or at all the owners or owner of any kind or at all, of the lots or parcels of land or any lot or parcel of land included within said alleged townsite described according to said alleged survey and lot or otherwise or at all or any building or buildings, improvement or improvements thereon, or upon any part or parcel thereof. And in this connection the plaintiffs allege that the defendants and each of them are trespassers upon the said property and upon each and every part and parcel thereof claimed by the defendants or either of them, and that they or either of them have no right, title or interest therein or thereto, and in this connection allege that the plaintiffs are the legal and equitable owners of the whole and every part of the premises and property involved in this action, free and discharged from any claim of the defendants and each and all of them, and that the

pla-ntiffs are also the legal and equitable owners of all the buildings and improvements thereon.

49 Plaintiffs deny that defendant John B. Whitcomb, as surviving partner of the firm Moses P. Whitcomb and John B. Whitcomb, late co-partners doing business under the firm name of Whitcomb Brothers, or in any capacity, or otherwise or at all, is the equitable or other owner, or at all the owner of any kind, of lots 1 and 2, block 10; lots 6, 7, 8, 9, 10 and 13, block 5; and lots 7, 8, 9 and 10, block 8, included within said alleged townsite described according to said alleged survey and plat, or otherwise or at all, or any or either of said lots or any part of any or either of said lots, or any lot or parcel whatever of land included within the premises and property in controversy herein, or any improvement or improvements, building or buildings thereon, or upon any part or parcel thereof. And in this connection the plaintiffs allege that said defendant, John B. Whitcomb, is a tresspas-er upon the said property and upon each and every part and parcel thereof claimed by him, and that he has no right, title or interest therein or thereto, and in this connection allege that the plaintiffs are the legal and equitable owners of the whole and every part of the premises and property involved in this action, and especially that portion thereof claimed by said defendant, John B. Whitcomb, free and discharged from any claim of said defendant, John B. Whitcomb, and that the plaintiffs are also the legal and equitable owners of all the buildings and improvements thereon.

50 Plaintiffs deny that defendants LeRoy H. Whitcomb and Martha Whitcomb, as sole heirs at law of Moses P. Whitcomb, deceased, or otherwise, and LeRoy H. Whitcomb, as special administrator of the estate of Moses P. Whitcomb, deceased, or otherwise, or either of them, are the equitable or other owners or owner, or at all the owners or owner of any kind, of lot 3, block 10, and all of blocks 11, 12, 13, 14, 15 and 16, included within said alleged townsite described according to said alleged survey and plat, or otherwise or at all, or said lot, or any or either of said blocks, or any part of said lot, or any part of any or either of said blocks, or any lot or parcel of land whatsoever included within the premises and property in controversy herein, or any building or buildings, improvement or improvements thereon, or upon any part or parcel thereof. And in this connection the plaintiffs allege that said defendants are trespassers, and each of them is a trespasser upon the said property, and upon each and every part and parcel thereof claimed by them or either of them, and that they or either of them have no right, title or interest therein or thereto, and in this connection allege that the plaintiffs are the legal and equitable owners of the whole and every part of the premises and property involved in this action, and especially that portion thereof claimed by said defendants, Martha Whitcomb and LeRoy H. Whitcomb, or either of them, free and discharged from any claim of said defendants or either of them, and that the plaintiffs are also the legal and equitable owners of all the buildings and improvements thereon.

51 Plaintiffs deny that defendants John Reed and Courtney D. Reed, his wife, or either of them, are the equitable or

other owners or owner, or at all the owners or owner of any kind, of lots 7, 8, 9 and 10, block 9; and lots 12, 13, 14 and 15, block 2, included within said alleged townsite according to said alleged survey and plat, or otherwise of at all, or any or either of said lots, or any part or parcel of land whatsoever included within the premises and property in controversy herein, or any building or buildings, improvement or improvements thereon, or upon any part or parcel thereof. And in this connection plaintiffs allege that said defendants, John Reed and Courtney D. Reed, his wife, are trespassers, and each of them is a trespasser, upon said property and upon each and every part and parcel thereof claimed by them or either of them, and that they or either or them have no right, title or interest therein or thereto, and in this connection allege that the plaintiffs are the legal and equitable owners of the whole and every part of the premises and property involved in this action, and especially that portion thereof claimed by said defendants, or either of them, free and discharged from any claim of said defendants or either of them, and that the plaintiffs are also the legal and equitable owners of all the buildings and improvements thereon.

Plaintiffs deny that defendants M. W. Caldwell and Alice Caldwell, his wife, or either of them, are the equitable or other
52 owners or owner, or at all the owners or owner of any kind, of lots 5 and 6, block 9, included within said alleged townsite described according to said alleged survey and plat, or otherwise or at all, or either of said lots, or any part of either of said lots, or any lot or parcel of land whatsoever included within said premises and property in controversy herein, or any building or buildings, improvement or improvements thereon, or upon any part or parcel thereof. And in this connection plaintiffs allege that said defendants, M. W. Caldwell and Alice Caldwell, his wife, are trespassers, and each of them is a trespasser, upon said property and upon each and every part and parcel thereof claimed by them or either of them, and that they or either of them have no right, title or interest therein or thereto, and in this connection allege that the plaintiffs are the legal and equitable owners of the whole and every part of the premises and property involved in this action, and especially that portion thereof claimed by said defendants, or either of them, free and discharged from any claim of said defendants or either of them, and that the plaintiffs are also the legal and equitable owners of all the buildings and improvements thereon.

Plaintiffs deny that defendants William Johnston and Hilma Johnston, his wife, or either of them, are the equitable or other owners or owner, or at all the owners or owner of any kind, of lots 18,
53 19 and 20, block 4, included within said alleged townsite according to said alleged survey and plat, or otherwise or at all, or any or either of said lots, or any part of any or either of said lots, or any lot or parcel of land whatsoever included within the premises and property in controversy herein, or any building or buildings, improvement or im-rovements thereon, or upon any part or parcel thereof. And in this connection plaintiffs allege that said defendants, William Johnston and Hilma John-

ston, are trespassers, and each of them is a trespasser, upon said property and upon each and every part and parcel thereof claimed by them or either of them, and that they or either of them have no right, title or interest therein or thereto, and in this connection allege that the plaintiffs are the legal and equitable owners of the whole and every part of the premises and property involved in this action, and especially that portion thereof claimed by said defendants, free and discharged from any claim of said defendants or either of them, and that the plaintiffs are also the legal and equitable owners of all the buildings and improvements thereon.

Plaintiffs deny that defendants A. H. Hasselroth and Wilhelmina Hasselroth, his wife, or either of them, are the equitable or other owners or owner, or at all the owners or owner of any kind, of lots 9 and 10, block 4, and lots 1 and 2, block 5, included within said alleged townsite according to said alleged survey and plat, or otherwise or at all, or any or either of said lots, or any part of any or either of said lots, or any lot or parcel of land whatsoever
54 included within the premises and property in controversy herein, of any building or buildings, improvement or improvements thereon, or upon any part or parcel thereof. And in this connection plaintiffs allege that said defendants A. H. Hasselroth and Wilhelmina Hasselroth, his wife, are trespassers, and each of them is a trespasser, upon said property and upon each and every part and parcel thereof claimed by them or either of them, and that they or either of them have no right, title or interest therein or thereto, and in this connection allege that the plaintiffs are the legal and equitable owners of the whole and every part of the premises and property involved in this action, and especially that portion thereof claimed by said defendants, free and discharged from any claim of said defendants or either of them, and that the plaintiffs are also the legal and equitable owners of all the buildings and improvements thereon.

Plaintiffs deny that defendants George Piatt and Elsie Piatt, his wife, or either of them, are the equitable or other owners or owner, or at all the owners or owner of any kind, of lots 4, 5, 6, 7 and 8, in block 4, included within said alleged townsite according to said alleged survey and plat, or otherwise or at all, or any or either of said lots, or any part of any or either of said lots, or any lot or parcel of land whatsoever included within the premises and property in controversy herein, or any building or buildings, improvement or improvements thereon, or upon any part or parcel thereof.

And in this connection plaintiffs allege that said defendants,
55 George Piatt and Elsie Piatt, are trespassers, and each of them is a trespasser, upon said property and upon each and every part and parcel thereof claimed by them or either of them, and that they or either of them have no right, title or interest therein or thereto, and in this connection allege that the plaintiffs are the legal and equitable owners of the whole and every part of the premises and property involved in this action, and especially that portion thereof claimed by said defendants, free and discharged from any claim of said defendants or either of them, and that the

plaintiffs are also the legal and equitable owners of all the buildings and improvements thereon.

Plaintiffs deny that defendants Andrew Paulson and Alvena Paulson, his wife, or either of them, are the equitable or other owners or owner, or at all the owners or owner of any kind, of lots 6, 7, 8, 9, 10 and 11 of block 2, included within said alleged townsite according to said alleged survey and plat, or otherwise or at all, or any or either of said lots, or any part of any or either of said lots, or any lot or parcel of land whatsoever included within the premises and property in controversy herein, or any building or buildings, improvement or improvements thereon, or upon any part or parcel thereof. And in this connection plaintiffs allege that said defendants Andrew Paulson and Alvena Paulson, are trespassers, and each of them is a trespasser, upon said property and upon each and
56 every part and parcel thereof claimed by them or either of them, and that they or either of them have no right, title or interest therein or thereto, and in this connection allege that the plaintiffs are the legal and equitable owners of the whole and every part of the premises and property involved in this action, and especially that portion thereof claimed by said defendants, free and discharged from any claim of said defendants or either of them, and that the plaintiffs are also the legal and equitable owners of all the buildings and improvements thereon.

Plaintiffs deny that defendant John Kirke is the legal or other owner, or at all the owner of any kind, of lots 8, 9, 10, 11 and 12, in block 3, included within said alleged townsite according to said alleged survey and plat, or otherwise or at all, or any or either of said lots, or any part of any or either of said lots, or any lot or parcel of land whatsoever included within the premises and property in controversy herein, or any building or buildings, improvement or improvements thereon, or upon any part or parcel thereof. And in this connection plaintiffs allege that said defendant, John Kirke, is a trespasser upon said property and upon each and every part and parcel thereof claimed by him, and that he has no right, title or interest therein or thereto, and in this connection allege that the plaintiffs are the legal and equitable owners of the whole and every part of the premises and property involved in this action, and especially that portion thereof claimed by said defendant,
57 and that the plaintiffs are also the legal and equitable owners of all the buildings and improvements thereon.

Plaintiffs deny that defendants Brocklin Dougharty and Nora Dougharty, his wife, or either of them, are the equitable or other owners or owner, or at all the owners or owner of any kind, of lot 11 in block 5, included within said alleged townsite according to said alleged survey and plat, or otherwise or at all, or any part of said lot, or any lot or parcel of land whatsoever included within the premises and property in controversy herein, or any building or buildings, improvement or improvements thereon, or upon any part or parcel thereof. And in this connection plaintiffs allege that said defendants, Brocklin Dougharty and Nora Dougharty, are trespassers, and each of them is a trespasser, upon said property and

upon each and every part and parcel thereof claimed by them or either of them, and that they or either of them have no right, title or interest therein or thereto, and in this connection allege that the plaintiffs are the legal and equitable owners of the whole and every part of the premises and property involved in this action, and especially that portion thereof claimed by said defendants, free and discharged from any claim of said defendants or either of them, and that the plaintiffs are also the legal and equitable owners of all the buildings and improvements thereon.

58 Plaintiffs deny that defendants Luke Cotter and Sadie Cotter, his wife, or either of them are the equitable or other owners or owner, or at all the owners or owner of any kind, of lot 12 in block 5, included within said alleged townsite according to said alleged survey and plat, or otherwise or at all, or any part of said lot, or any lot or parcel of land whatsoever included within the premises and property in controversy herein or any building or buildings, improvement or improvements thereon, or upon any part or parcel thereof. And in this connection plaintiffs allege that said defendants, Luke Cotter and Sadie Cotter, are trespassers, and each of them is a trespasser, upon said property and upon each and every part and parcel thereof claimed by them or either of them, and that they or either of them have no right, title or interest therein or thereto, and in this connection allege that the plaintiffs are the legal and equitable owners of the whole and every part of the premises and property involved in this action, and especially that portion thereof claimed by said defendants, free and discharged from any claim of said defendants or either of them, and that the plaintiffs are also the legal and equitable owners of all the buildings and improvements thereon.

59 Plaintiffs deny that defendants Walter Fleming and Rose Fleming, his wife, or either of them are the equitable or other owners or owner, or at all the owners or owner of any kind, of lots 14 and 15 in block 5, included within said alleged townsite according to said alleged survey and plat, or otherwise or at all, or any or either of said lots, or any part of either of said lots, or any lot or parcel of land whatsoever included within the premises and property in controversy herein, or any building or buildings, improvement or improvements thereon, or upon any part or parcel thereof. And in this connection plaintiffs allege that said defendants, Walter Fleming and Rose Fleming, are trespassers, and each of them is a trespasser, upon said property and upon each and every part and parcel thereof claimed by them or either of them, and that they or either of them have no right, title or interest therein or thereto, and in this connection allege that the plaintiffs are the legal and equitable owners of the whole and every part of the premises and property involved in this action, and especially that portion thereof claimed by said defendants, free and discharged from any claim of said defendants or either of them, and that the plaintiffs are also the legal and equitable owners of all the buildings and improvements thereon.

Plaintiffs deny that defendant Charles Schindler is the equitable

or other owner, or at all the owner of any kind, of lots 3, 4 and 5 in block 5, included within said alleged townsite according to said alleged survey and plat, or any or either of said lots, or any part of any or either of said lots, or any lot or parcel of land whatsoever included within the premises and property in controversy herein, or any building or buildings, improvement or improvements thereon, or upon any part or parcel thereof. And in this connection
60 plaintiffs allege that said defendant, Charles Schindler, is a trespasser upon said property and upon each and every part thereof claimed by him, and that he has no right, title or interest therein or thereto, and in this connection allege that the plaintiffs are the legal and equitable owners of the whole and every part of the premises and property involved in this action, and especially that portion thereof claimed by said defendant, free and discharged from any claim of said defendant, and that the plaintiffs are also the legal and equitable owners of all the buildings and improvements thereon.

Plaintiffs deny that defendants Jason Edwards and Julia Edwards, his wife, or either of them, are the equitable or other owners or owner, or at all the owners or owner of any kind, of lots 1 and 2 in block 9, included within said alleged townsite according to said alleged survey and plat, or otherwise or at all, or either of said lots or an- part of either of them, or any lot or parcel of land whatsoever included within the premises and property in controversy herein, or any building or buildings, improvement or improvements thereon, or upon any part or parcel thereof. And in this connection plaintiffs allege that said defendants, Jason Edwards and Julia Edwards, are trespassers, and each of them is a trespasser, upon said property and upon each and every part and parcel thereof claimed by them or either of them, and that they or either of them have no right, title or interest therein or thereto, and in this connection allege that
61 the plaintiffs are the legal and equitable owners of the whole and every part of the premises and property involved in this action, and especially that portion thereof claimed by said defendants, free and discharged from any claim of said defendants or either of them, and that the plaintiffs are also the legal and equitable owners of all buildings and improvements thereon.

Plaintiffs deny that defendants Gordon Dougharty and Ida Dougharty, his wife, or either of them, are the equitable or other owners or owner, or at all the owners or owner of any kind, of lots 4, 5, 6, 7, and 8, in block 10, included within said alleged townsite according to said alleged survey and plat, or otherwise or at all, or any or either of said lots, or any part of any or either of them, or any lot or parcel of land whatsoever included within the premises and property in controversy herein, or any building or buildings, improvement or improvements thereon, or upon any part or parcel thereof. And in this connection plaintiffs allege that said defendants, Gordon Dougharty and Ida Dougharty, are trespassers, and each of them is a trespasser, upon said property and upon each and every part and parcel thereof claimed by them or either of them, and that they or either of them have no right, title or interest therein or thereto, and in this connection allege that the plaintiffs are the

legal and equitable owners of the whole and every part of the premises and property involved in this action, and especially that por-
62 tion thereof claimed by said defendants, free and discharged from any claim of said defendants or either of them, and that the plaintiffs are also the legal and equitable owners of all buildings and improvements thereon.

Plaintiffs deny that defendant Mrs. Emma Lloyd is the equitable or other owner, or at all the owner of any kind, of lots 4, 5 and 6, in block 8, included within said alleged townsite according to said alleged survey and plat, or otherwise or at all, or any or either of said lots, or any part of any or either of them, or any lot or parcel of land whatsoever included within the premises and property in controversy herein, or any building or buildings, improvement or improvements thereon, or upon any part or parcel thereof. And in this connection plaintiffs allege that said defendant, Mrs. Emma Lloyd, is a trespasser upon said property and upon each and every part thereof claimed by her, and that she has no right, title or interest therein or thereto, and in this connection allege that the plaintiffs are the legal and equitable owners of the whole and every part of the premises and property involved in this action, and especially that portion thereof claimed by said defendant, free and discharged from any claim of said defendant, and that the plaintiffs are also the legal and equitable owners of all buildings and improvements thereon.

Plaintiffs deny that defendant John B. Whitcomb is the
63 equitable or other owner, or at all the owner of any kind, of lots 11, 12, 13, 14 and 15, in block 4, included within said alleged townsite according to said alleged survey and plat, or otherwise or at all, or any or either of said lots, or any part of any or either of them, or any lot or parcel of land whatsoever included within the premises and property in controversy herein, or any building or buildings, improvement or improvements thereon, or upon any part or parcel thereof. And in this connection plaintiffs allege that said defendant, John B. Whitcomb, is a trespasser upon said property and upon each and every part thereof claimed by him, and that he has no right, title or interest therein or thereto, and in this connection allege that the plaintiffs are the legal and equitable owners of the whole and every part of the premises and property involved in this action, and especially that portion thereof claimed by said defendant, free and discharged from any claim of said defendant, and that the plaintiffs are also the legal and equitable owners of all buildings and improvements thereon.

Plaintiffs deny that defendant Frank Allen is the equitable or other owner, or at all the owner of any kind, of lots, 1, 2, 3, 4, 5, 6 and 7, in block 3, and lots 1, 2, 3, 4, 5 and 6 in block 1, included within said alleged townsite, according to said alleged survey and plat, or otherwise or at all, or any or either of said lots, or any part of any or either of them, or any lot or parcel of land whatso-
64 ever included within the premises and property in controversy herein, or any building or buildings, improvement or improvements thereon, or upon any part of parcel thereof. And in

this connection plaintiffs allege that said defendant, Frank Allen, is a trespasser upon said property and upon each and every part thereof claimed by him, and that he has no right, title or interest therein or thereto, and in this connection allege that the plaintiffs are the legal and equitable owners of the whole and every part of the premises and property involved in this action, and especially that portion thereof claimed by said defendant, free and discharged from any claim of said defendant, and that the plaintiffs are also the legal and equitable owners of all buildings and improvements thereon.

Plaintiffs deny that defendant T. B. McWilliams is the equitable or other owner, or at all the owner of any kind, of lots 16 and 17, in block 5, included within said alleged townsite, according to said alleged survey and plat, or otherwise or at all, or any or either of said lots, or any part of either of said lots, or any lot or parcel of land whatsoever included within the premises and property in controversy herein, or any building or buildings, improvement or improvements thereon, or upon any part or parcel thereof. And in this connection plaintiffs allege that said defendant T. B. McWilliams, is a trespasser upon said property and each and every part thereof claimed by him, and that he has no right, title or
65 interest therein or thereto, and in this connection allege that the plaintiffs are the legal and equitable owners of the whole and every part of the premises and property involved in this action, and especially that portion thereof claimed by said defendant, free and discharged of any claim of said defendant, and that the plaintiffs are also the legal and equitable owners of all buildings and improvements thereon.

Plaintiffs deny that the defendants or either of them or the grantors or any grantor of defendants or either of them, or the predecessors or any predecessor of the defendant or either of the defendants, have been in the possession of the property described in the cross complaint as claimed by the defendants respectively for a period of time antedating the settlement of plaintiffs upon the land involved in this action, and allege the facts to be as found by the officers of the department of the interior of the United States, viz: that they were not settlers upon or occupants of said premises and property or any part thereof at the time of the settlement of plaintiff John E. White; and deny that the defendants or any or either of them are entitled respectively or otherwise to have a legal or any title to the lot or lots, parcel or parcels of land claimed by, in the possession of, or improved by the defendants respectively, or by any person or persons, free from any claim or demand of the plaintiffs or otherwise or at all. And in this connection the plaintiffs allege that
66 the improvements placed upon the property involved in this action were made and placed thereon after full knowledge and notice of the rights of the plaintiffs and their claims in and to the land involved in this action, and after notice that if they entered upon said land or improved the same they did so at their peril and their own risk and contrary to the wishes of the plaintiffs, and contrary to the notice given by the plaintiffs to the defendants and those under whom the defendants pretend to claim.

Plaintiffs in the amended complaint herein, further answering the cross-complaint of the defendants named in the amended complaint and those that have been brought in or substituted on account of the death of defendant Moses P. Whitcomb, allege:

I.

That the facts are as alleged and set forth in paragraphs numbered twenty-two (XXII.), twenty-three (XXIII.), twenty-four (XXIV.), twenty-five (XXV.), twenty-six (XXVI.), and twenty-seven (XXVII.) of the amended complaint of the plaintiffs herein, and reference to said allegations is hereby made, and the same are hereby realleged to the same extent and as fully as if set forth in full in this answer to the cross complaint, and as a defense and counter claim to said cross complaint.

II.

That in the contest in the department of the interior of the
67 United States, in which contest said department had full jurisdiction, the findings of fact and all questions of mixed law and fact were and are in favor of said John E. White and against said probate judge and said alleged townsite claimants, which findings of fact are shown by the decisions of the secretary of the interior of May 22, 1899, and May 1, 1903, which said decisions and the whole and every part thereof and of each of them are set forth in Exhibits "A" and "B" hereto attached and made a part hereof, said Exhibit "A" being said decision of May 22, 1899, and said Exhibit "B" being said decision of May 1, 1903.

Plaintiffs allege the facts to be as set forth in their amended complaint herein, and that they are entitled to the relief therein prayed for, and alleged that defendants or either of them are not entitled to any relief whatever as to or against plaintiffs or either of them.

III.

That no question of fact or mixed question of fact and law is raised by said cross complaint that was not raised and considered in said contest, and all questions of fact and all mixed questions of fact and law that were, could or can be raised were raised, considered, found and determined in said contest in favor of plaintiffs and against the probate judge of Kootenai county, Idaho, and the alleged townsite claimants, that is, the defendants and each of them and all
68 persons claiming as a townsite occupant at any time. That the land officers had jurisdiction of said contest and full power and authority to determine all questions of fact and all questions of mixed law and fact, and so found and determined them in favor of plaintiffs and against defendants and said probate judge. That all the alleged townsite claimants took part in the conduct, management and control of said contest.

IV.

That at all times during the pendency of said contest rule number 41 of the rules of practice of the department of the interior was, and still is, as follows:

"No testimony will be excluded from the record by the register and receiver on the ground of any objection thereto; but when objections is made to testimony offered the exceptions will be noted, and the testimony with the exceptions, will come up with the case for the consideration of the Commissioner. Officers taking testimony will, however, summarily put a stop to obviously irrelevant questioning."

That said rule was observed and complied with by the local officers, and upon the appeals from the local officers all evidence offered and taken down and transcribed was transmitted with the respective appeals and duly considered by the secretary of the interior.

V.

That this court is without power or jurisdiction to review the decisions or findings of facts or determinations of mixed
69 questions of fact and law made, considered, found or determined by the secretary of the interior, upon or under the allegations of the cross complaint or any allegations thereof.

VI.

That, the secretary of the interior having decided that the settlement of John E. White on said northwest quarter of the southwest quarter of said section was made prior to that of any townsite occupancy thereon, and that the entry of said White on which his patent, involved herein, was issued, was made by him in good faith, any contrary contention on the part of the cross complainants involving a different state of facts,—including the averment that said entry was made by said White, "with the intent to cheat and defraud the said town occupants, and to obtain title to the lots, buildings and improvements of said town occupants falsely claiming that the same was unappropriated public lands, whereas in truth and in fact the said northwest quarter of the southwest quarter (N. W. ¼ S. W. ¼) was then and at all times since long prior to his settlement has been occupied as a town, and for purposes of trade and business, and not for agriculture, and the same was under the law appropriated as and for a townsite, and the same was not subject to entry under the preemption or homestead laws, or for any other purpose except as a townsite for the use and benefit of the occupants of said town,"—
raises a mixed question of law and fact (if it raises any ques-
70 tion at all), and the said decision of the secretary of the interior in favor of plaintiffs became and is final and cannot be reviewed by this or any court.

VII.

That the cross complaint herein is without equity, in that it fails to show any error of law inhering in the action of the land depart-

ment of the United States in overruling the claim of the townsite or townsite claimants to be allowed to enter the land in dispute under the townsite laws and in issuing a patent to the cross defendant John E. White under the homestead laws.

VIII.

That the allegations of error on the part of the register and receiver are indefinite, ambiguous and uncertain and pertain wholly to matters within the exclusive jurisdiction of the land department, and said averments fail to show that any proper exception was taken thereto or appeal therefrom or injury suffered thereby.

IX.

That the charges of fraud are vague, indefinite unintelligible and insufficient, and it does not appear therefrom that the issues on which the same are based were not before the land department and involved in a decision thereon in favor of cross defendant John E. White.

71 Wherefore, plaintiffs pray that defendants have and take nothing by their cross complaint or cross action herein; that the claims of defendant be for naught held; that plaintiffs be decreed the owners in fee of the premises involved in this action; that they be given and afforded the relief prayed for in the amended complaint; and such other relief as to the court shall seem meet, equitable and proper.

H. M. STEPHENS,
Attorney for Plaintiffs.
JOHN E. WHITE AND
ROBERTA B. WHITE.

Duly Verified. Filed Nov. 22, 1904.

EXHIBIT "A."

DEPARTMENT OF THE INTERIOR,
WASHINGTON. C. J. W.

Vol. 25—663. V. B. A. B. P. F. L. C.

MAY 22, 1899.

W. V. D.

HENRY MEDLER, as Trustee for Occupants of Townsite of Clark's Fork,
vs.
JOHN E. WHITE.

Involving the N. W. ¼ of *of* S. W. ¼ Sec. 2, T. 55 No. R 2 E., Cœur d'Alene, Idaho.

The Commissioner of the General Land Office.

SIR: November 27, 1895, John E. White made homestead entry for the N. ½. of the S. W. ¼ and lots 5 and 6, Sec. 2, T. 55 N.,

R. 2 E., Cœur d'Alene, Idaho, said entry being made on the
72 day the approved plat of the township was filed in the local land office.

On the same day, but after White's entry was of record, Henry Melder, as probate judge of Kootenai county, Idaho, applied to file a townsite declaratory statement, with a plat of the town of Clarks Fork attached, for the N. W. ¼ of the S. W. ¼ of said section, which was rejected because of conflict with White's entry. Subsequently, on January 8, 1896, said Melder, as probate judge, and for the benefit of the townsite claimants, filed an affidavit of contest, asking for the cancellation of White's entry as to said N. W. ¼ of the S. W. ¼, upon the ground that said forty acre tract had been used and occupied for townsite purposes since the year 1884, and that the entry was made for speculative purposes.

A hearing was had, at which both parties appeared and submitted testimony, which resulted in a decision by the local officers May 14, 1896, to the effect that about two acres of the forty acre tract in question should be awarded to the contestant, and that White's entry remained intact, provided he should agree to convey, after patent, said two acres to said probate judge, in trust for the benefit of the occupants for townsite purposes.

Both parties appealed from this decision, and on February 6, 1897, your office considered the case and held White's entry for cancellation as to the N. W. ¼ of the S. W. ¼ of Sec. 2, T. 55 N., R. 2, E. B. M.

73 The defendant moved for review of said decision, which motion was denied by your office on May 12, 1897. The defendant then appealed to the Department, and on August 31, 1898, your office decision of February 6, 1897, was affirmed (not reported).

Defendant White filed a motion for review of said departmental decision, an order entertaining which was made on November 16, 1898, and transmitted, together with the motion, to your office, to be returned to the applicant for service upon the opposite party.

December 30, 1898, your office transmitted said motion to the Department, with evidence of its service, and it is now to be considered, together with the showing made in opposition thereto.

The first and second grounds of alleged error do not require notice, as they present no question affecting the merits of the case, and constitute no sufficient reason for its review. The remaining grounds of error are as follows:

3. By holding in effect that occupation by lessees of the Northern Pacific Railway company, of land wholly covered by the right of way of said company, for the purpose of a *declining* and limited trade and business, excepted the whole of the forty acre tract traversed by said railroad and right of way from the operation of the homestead laws, even where such occupation was given up and abandoned for other locations after appellant's homestead rights had attached; and that a *bona fide* settlement made and an im-
74 provement by the settler of a part of said legal subdivision, not demanded and wholly unsuited for townsite purposes,

will, after survey and years of improvement and continuous residence, count for naught and the homestead *entry* therefore have to be cancelled on account of the townsite claims of such railroad lessees, each of whom, until four years subsequent to the initiation of such settlement, intended to acquire title to the same land under the homestead laws.

4. In failing to point out and correct errors of fact contained in the Commissioner's said decision of February 6, 1897, the existence of which were practically admitted in the decision of the Acting Commissioner of the general land office on review, a correct statement of which facts the appellant is clearly entitled to receive, even though your honor should hold the same views entertained by the said Acting Commissioner as to the question of law involved.

5. By holding in effect that prior to White's settlement several residences on the land off the right of way were occupied by persons doing business in the alleged town and that such occupation was settlement and occupation for townsite purposes, and in holding that any part of the land not upon the right of way was used for the purpose of trade and business prior to the attaching of the adverse rights of the homestead entryman.

6. By holding in effect that any part of the new buildings of Nagel's firm occupied any portion of the lots on which their building or buildings stood when on the right of way and by giving an incorrect idea as to the nature and extent of the improvements off of the right of way.

75 7. By holding in effect that occupants generally believed that said right of way was only one hundred feet in width on each side of the main track and in giving consideration to such alleged belief *in the face of the provision contained in a public statute to the contrary.*

8. In holding in effect that the contestant made a *prima facie* case, and that there was in fact such occupancy for townsite purposes as would reserve the land from settlement under the provisions of Sec. 2387, U. S. R. S.

These grounds present matters which require consideration.

The facts leading up to the controversy are stated by the local officers, who heard the testimony, as follows:

From the testimony it appears that one John G. Nagel located as a homestead, in the year 1884, all that portion of the tract in controversy north of the Northern Pacific railroad track; that he cleared, improved and cultivated the same; that afterwards he conducted a small general merchandise store, in connection with his said homestead, and continued to conduct the said store up to the year 1889.

In 1889 a discovery of mineral was made in the adjoining section, which caused a mining excitement, when Mr. Nagel had a portion of the tract in controversy (which was then a part of his homestead) surveyed into lots and blocks, not as a townsite, but, to use Mr. Nagel's own words: "*To accommodate the business then demanded.*" (See Nagel's testimony, page 53.)

76 A plat of said survey is filed with the testimony and marked "Contestant's Exhibit D," said plat does not give any boun-

daries of the tract of land embraced therein, nor the area, nor any statement of the extent and general character of the improvements; it is not verified; it does not appear to have been filed with the recorder of the county within which the land is situated, nor in the local land office, nor in the general land office, in fact it does not in any particular comply or attempt to comply with the provisions of sections 2380, 2381, 2382, 2383, 2384, 2385, 3286, 2387, 2388, 2389, United States Revised Statutes. The testimony shows that the lots and blocks on said plat commence at a point one hundred and fifteen feet north from the center of the Northern Pacific Railroad track, and that said lots are one hundred and ten feet deep; that all the business buildings were erected on the front row of lots as shown by contestant's exhibit "D," thus it will be noticed that all of said business buildings were erected on the right of way of the Northern Pacific railroad company, and not on the tract in controversy. A reference to contestant's exhibit "A" will show the exact location of all buildings at Clark's Fork in December, 1892. Witnesses Nagel and Butler testify that when they built their houses they supposed the right of way of the Northern Pacific R. R. Co. was only one hundred feet on each side of the center of the main track, and that they supposed their houses were on the tract in controversy, up to some time in 1893, when the Northern Pacific R. R. Co. asserted its right to the land, and leased the ground upon which all the business houses at Clarks Fork were located to the respective owners of said houses.

77 This fact is stoutly denied by all the witnesses for the contestee, and especially by one S. R. Catlow, who testifies that the width of the right of way was discussed by nearly every person in Clarks Fork during the fall of 1889 and the winter of 1890; that he wrote to the general land office, and was informed that the right of way was two hundred feet from each side of the center of the track; that this letter was public property, and was shown to nearly every person in and around Clarks Fork. (Catlow's testimony, page 124).

In 1891 John E. White, the contestee, located with other lands nearly all of the tract in controversy south of the Northern Pacific railroad track, and commenced the erection of a dwelling thereon, and established actual residence in said house, with his family, in February, 1892, and has resided thereon, improved and cultivated the same continuously since 1892, and is now residing thereon, his improvements being valued at $2000.

In 1891 M. P. Whitcomb (one of the applicants for the townsite) located as a homestead a small portion of the tract in controversy south of the Northern Pacific railroad track, and erected a dwelling house and established his residence therein during 1892, subsequent to that of White, and has continued to reside thereon and is now residing thereon. When the field work of the government survey was made in 1893, Whitcomb's residence or dwelling house was found to be partly on the tract in controversy and partly on section No. 3.

Thus the tract remained from 1889 to 1893 with the store of Nagel,

the hotel of Roberts, and the saloon of Butler located on the
78 north side of the railroad track and on the right of way of the Northern Pacific Railroad company, and the residence of White and a portion of the residence of Whitcomb on the south of the railroad track.

During 1893 after the field work of the government survey was extended over the tract in controversy, White, Whitcomb, Nagel and Butler gave out that they intended to enter the same under the homestead laws.

During 1893 the Northern Pacific Railroad Company asserted its right to the land occupied by Nagel, Roberts, and Butler Bros., and leased the same to the aforesaid parties, and they and each of them continued to occupy said premises under said lease and not otherwise up to the summer of 1894, when the Northern Pacific railroad company refused to further lease said premises to the Butler Bros., and notified them to remove their buildings off from the right of way, which they did some time in the fall of 1894, and moved their said buildings upon the tract in controversy.

The contestee testifies that in the spring of 1895, Whitcomb and Nagel attempted to effect a compromise, so that a joint filing could be made under the homestead laws, by which said Nagel, Whitcomb and contestee could perfect title to the land claimed by each of them prior to survey. This the contestee refused to do, and soon thereafter the said Whitcomb and Nagel commenced the erection of a store building and occupied the same as a general merchandise store on the tract in controversy and off of the right of way. Roberts con-
tinues to lease the railroad company, and his place of business
79 is now located on the right of way of the Northern Pacific railroad company. Thus the matter stood until October 26, 1895, when notice was published that on and after the 27th day of November, 1895, the official plats of said township would be on file in this office, and that this office would receive filings or entries for lands in said township on and after said 27th day of November, 1895. On October 29, 1895, a petition (contestant's exhibit "C") was filed with the probate judge in and for Kootenai county, Idaho, signed by ten persons, claiming to be residing on the tract in controversy, asking the said probate judge to secure said tract as a townsite under the name of Clarks Fork. This appears to be the first attempt to obtain title to the tract in controversy under the townsite laws.

In pursuance to said petition the said probate judge caused a portion of the tract in controversy to be surveyed into lots and blocks, streets and alleys, a plat of which is filed herein marked contestant's exhibit "A".

It further appears from the testimony and exhibits that about twenty-five feet of the north or back end of the lots as surveyed in 1889 as shown by contestant's exhibit "D" is and was off of the right of way and on the tract in controversy, and Nagel and Butler testify on rebuttal that said twenty-five feet was used in connection with their business.

Nagel, Butler and Whitcomb failing to exercise whatever rights they claimed as settlers under the homestead laws within the statutory period waived the same.

Whitcomb, according to his own testimony (page 24,) in-
80 tended to enter the tract in controversy as a homestead up to September, 1895.

Butler, according to his own testimony (page 44,) told a dozen people that it was his intention to enter the tract in controversy as a homestead as late as August, 1895.

Nagel, according to his own testimony (page 59), intended to include the tract in controversy in his homestead entry as late as 1895.

Thus it will be noticed that all of the parties now engaged in business on the tract in controversy intended to enter the same under the homestead laws. They certainly could not be asserting and maintaining claim to the tract in controversy under the homestead laws and under the townsite laws at the same time.

We are therefore of the opinion that said townsite claimants have no legal right to the tract in controversy, but as a matter of equity we believe they should be protected to the extent of the ground actually occupied and improved by them.

So far as the decision of the local officers undertakers to summarize the fact, the summary appears to be substantially correct.

It appears that the Northern Pacific railroad was constructed through and over the land in controversy before any of the present claimants made settlement thereon, and that its track passes diagonally through the forty in question, leaving the major portion on the south and the minor portion on the north side of the track.

81 The first improvements were evidently erected under the impression that the right of way of the railroad company was only two hundred feet in width and it resulted that they were erected upon the right of way, which was in fact two hundred feet in width on each side of the track.

The Northern Pacific Railroad Company holds its right of way under the second section of the act of July 2, 1864 (13 Stat., 365), which is as follows:

That the right of way through the public lands be, and the same is hereby, granted to said "Northern Pacific Railroad Company," its successors and assigns, for the construction of a railroad and telegraph as proposed; and the right, power and authority is hereby given to said corporation to take from the public lands, adjacent to the line of said road, material of earth, stone, timber, and so forth, for the construction thereof. Said way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary ground for station buildings, work shops, depots, machine shops, switches, side tracks, turntables and water stations; and the right of way shall be exempt from taxation within the territories of the United States. The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the said Indian, the Indian titles to all lands falling under the operation of this act, and acquired in the donation to the (road) named in this bill.

It is insisted by contestee that under this grant the rail-
82 road company took the fee to the strip of land embraced in its right of way, and not a mere easement therein, and that neither settlement nor the erection of business houses upon the right of way could constitute a claim to adjoining public land.

The decision complained of treated the strip granted for right of way purposes as a mere easement, and held, in substance, that settlement upon it which did not interfere with the operations of the road by the company extended to the remainder of the forty acre tract on which such settlement was made. That decision treated the grant of the right of way as conveying no greater right to the railroad company than that conveyed by the act of July 4, 1884 (23 Stat., 73) granting the right of way to the Southern Kansas Railway company, whose successor, the Atchison, Topeka and Santa Fe railroad company is spoken of by the supreme court in the case of Smith *vs.* Townsend (148 U. S. 490) as having only an easement in the land, and not the fee.

But, as before stated, it is insisted by the contestee that the Northern Pacific railroad company under the act of July 2, 1864, *supra*, upon its compliance with the terms of the granting act, took the fee to its right of way, and reference is made to the case of Missouri, Kansas and Texas railway company *vs.* Roberts (152 U. S., 114), and to the case of New Mexico *vs.* United States Trust Com-
83 pany, decided by the Supreme Court December 5, 1898 (172 U. S., 171), in support of the contention.

The right of way clause considered in the latter case is as follows:

SEC. 2. *And be it further enacted,* That the right of way through the public lands be, and the same is hereby, granted to the said Atlantic and Pacific railroad company, its successors and assigns, for the construction of a railroad and telegraph as proposed; and the right, power and authority is hereby given to said corporation to take from the public lands adjacent to the line of said road material of earth, stone, timber and so forth, for the construction thereof. Said way is granted to said railroad to the extent of one hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary grounds for station buildings, work shops, depots, machine shops, switches, side tracks, turn tables and water stations, and the right of way shall be exempt from taxation within the territories of the United States.

The court held, in substance, that the railroad company took the fee under this grant and not a mere easement or incorporeal right. Referring, with approval, to the case first cited, the opinion declares (page 182):

So this court in Missouri, Kansas and Texas railway *vs.* Roberts, 152 U. S., 114, passing on a grant to one of the branches of the Union Pacific railway company of a right of way two hundred feet wide, decided that it conveyed the fee. The effect of this decision
84 is attempted to be avoided by saying that the distinction between an easement and the fee was not raised. The action was ejectment, and was brought in Kansas, and under the law of that

state title could be tried in ejectment. Title was asserted by Roberts who was plaintiff in the state court, and this court evidently considered it involved in the case. The language of Mr. Justice Field, who delivered the opinion of the court, would be unaccountable else. The difference between an easement and the fee would not have escaped his attention and that of the whole court, with the inevitable result of committing it to the consequences which might depend upon such difference.

As the language of the grant of a right of way to the Northern Pacifice railway company is the same as in the grant to the Atlantic and Pacific railroad company, except as to width, it follows that the Northern Pacific railroad company took the fee and not a mere easement to the strip of land four hundred feet wide constituting its right of way.

While the language used by the supreme court in the two cases cited justifies the contention that the right of way clauses considered in said cases granted a fee in contradistinction to a mere easement, it is to be observed that the court in neither case undertakes to say what kind of fee was granted. Indeed, it is apparent, not only from the nature of the questions then before the court, but from the language used, that the court was considering whether the grant was an easement or a fee, rather than any question as to the char-
85 acter of the fee. It is not said in either case that the right of way clause conveyed a fee simple estate to the grantee, though it is expressly held that more than an easement was granted.

Blackstone (Vol. 2, p. 104) describes a fee or fee simple as generally:

importing an absolute inheritance, clear of any condition, limitation, or restrictions to particular heirs, but descendible to the heirs general whether male or female, lineal or collateral.

Such title evidently confers upon the owner of property the right to use it for any purpose recognized as legitimate and to change the character of the use from time to time, or to suspend use of it at his pleasure. It is not believed that the Northern Pacific railroad company has such title to its right of way as would enable it to alienate the land granted to it for railroad purposes so as to enable the grantee to use it exclusively for some other and different purpose, or that, if the company's use of the land for railroad purposes was abandoned, its title would be unaffected. Yet, if the grant is a fee or fee simple as generally understood, this would be true.

Blackstone (Vol. 2, p. 109), describes another character fee as follows:

A base, or qualified fee, is such a one as hath a qualification subjoined thereto, and which must be determined whenever the qualification annexed to it is at an end. As, in the case of a grant
86 to A and his heirs, *tenants of the manor of Dale;* in this instance, whenever the heirs of A ceased to be tenants of that manor, the grant is entirely defeated.

So the grant of land for a right of way to the Northern Pacific railroad company may endure forever, yet its duration depends upon

the continued use of such land for the purpose for which the grant was made. This circumstance so far debases the donation as to make it a base or qualified fee.

Such seems to be the character of title under which the Northern Pacific railroad company holds its right of way. It is a complete title, however, so long as the qualification annexed to it is not at an end, and confers upon the company the exclusive right of possession, so that a settlement upon the right of way is not a settlement upon the public land, and confers no right or claim to the adjoining public land.

The supreme court, in the case of Northern Pacific railroad company *vs.* Smith (171 U. S., 260), rendered a decision which, while not involving the character of estate held by the company in its right of way, is not without some bearing upon the matter here under consideration. Smith claimed title to certain town lots within the right of way claimed by the railroad company. The lots were a part of a townsite patented to the mayor of Bismarck on July 21, 1879, and Smith claimed under a conveyance from the corporate authorities of the city. It appears that in the year 1872 the Lake Superior
87 and Puget Sound Land company occupied the land and surveyed it into town lots, but no plat of the survey was filed in the register's office until February 9, 1874, after the railroad company had constructed its road through the land and gone into possessions of its right of way. Afterwards the survey and plat were adopted as the townsite of the city of Bismarck, and on application patent issued to John A. McLean as mayor of said city for the land so surveyed, in which the right of way of the railroad company was not mentioned. It was held inasmuch as the railroad company constructed its road and occupied the land before the townsite map was filed, before the title was filed by said mayor, and without any protest or interference from the city of Bismarck, or its grantee, Smith, they could not disturb the possession of said railroad company in its right of way, extending two hundred feet on each side of its road. It is therein said:

The finding of the trial court, that only twenty-five feet in width has ever been occupied for railroad purposes, is immaterial. By granting a right of way four hundred feet in width, Congress must be understood to have conclusively determined that a strip of that width was necessary for public work of such importance, and it was not competent for a court, at the suit of a private party, to adjudge that only twenty-five feet thereof were occupied for railroad purposes in the face of the grant and of the finding that the entire land in dispute was within two hundred feet of the track of the railroad as actually constructed, and that the railroad company was in actual possession thereof by its tenants. The precise
88 character of the business carried on by such tenants is not disclosed to us, but we are permitted to presume that it is consistent with the public duties and purposes of the railroad company.

It being determined that the townsite claimants acquired no rights by virtue of any settlement upon or occupation of the right

of way, it becomes necessary to consider the alternative proposition submitted by them, to the effect that, if it be held that the fee to the right of way is in the railroad company, the survey which was made over it, as though it was a mere easement, is void, and a new survey should be made and closed upon the lines of said right of way.

Section 2395 of the Revised Statutes lays down the general plan on which the surveys are to be conducted, and is as follows:

The public lands shall be divided by north and south lines run according to the true meridian, and by others crossing them at right angles so as to form townships of six miles square, unless where the line of an Indian reservation, or of tracts of land heretofore surveyed or patented, or the course of navigable rivers, may render this impracticable; and in that case this rule must be departed from no further than such particular circumstances require.

It is apparent that the rules prescribed to be observed in making surveys are directory and intended to be applied to bodies of unsurveyed public land, which are to be subdivided according to
89 such rules, and disposed of according to survey.

Here, after the railroad was constructed through unsurveyed public land, a public survey was made, in which the lines of the survey were extended across the railroad right of way as in cases of a mere easement. The survey has been approved and many tracts of the public lands adjoining the right of way have been disposed of in accordance with such survey, and the question is, shall it be now set aside and a resurvey made, simply that the survey may be made to close upon the lines of the land granted to the railroad company for right of way purposes, when it does not appear that the interests either of the railroad company or of the United States render such course necessary. The survey did not and could not affect the title or right of the railroad company. The purpose of a survey is to so subdivide the public lands that they may be readily identified. But here that object is not defeated by the inclusion of this right of way in the lands surveyed. Their identification is not interfered with. The existence, location and extent, of the right of way across the several subdivisions are all well known so that there is no difficulty in identifying the portion of each subdivision which remain subject to settlement and disposition as public land. The disturbance of the survey at this late day is not justified upon any grounds suggested.

Both parties claim to have acquired rights to the land in
90 dispute by virtue of settlement upon it prior to survey.

The act of June 2, 1862 (12 Stat., 413) appears to be the first general statute which recognized the right to make settlement on the public lands before survey, with a view to acquiring title after survey, but it was limited to preemption claimants. This right was extended to settlers under the homestead laws by the act of May 14, 1880 (21 Stat., 140) The townsite acts of July 1, 1864 (13 Stat., 343), and March 2, 1867 (14 Stat., 541), also give recognition to townsite settlements made on the public lands prior to the survey thereof.

It is the established rule that, in the absence of a statute making special provision to the contrary, public lands can be disposed of only according to the legal subdivisions of the public survey, and as logically resulting from this it is equally established that the right obtained by settlement under the homestead law upon a given legal subdivision extends to the whole of that subdivision.

Questions as to priority of right, or adjustment of rights, acquired by settlement prior to survey, can only arise where the settlement is made *prior to the survey in the field.* Lord *vs.* Perrin, 8 L. D., 536.

In the case at bar, at the time of the survey in the field, White was the only settler on this subdivision except Whitcomb, the other parties at that time being located on the right of way, and
91 as to them White's right, as a prior settler, attached to the entire tract from such time. Any right Whitcomb may have had as a homestead settler by reason of his settlement before survey in the field, is lost by his failure to assert the same under the homestead law.

The evidence shows that after the survey in the field White made claim to the entire tract and exercised rights of ownership over the same. It was necessary for him to adjust his settlement claim to the lines of the public survey, and in so doing to include the legal subdivision on which his improvements were placed.

It appears that on November 18, 1890, White filed in the office of the county recorder of Kootenai county, Idaho, a notice of a "possessory right," to the land south of the railroad right of way, and it is urged that he is estopped from now claiming any part of the tract north of the railroad right of way, because it was not included in said notice. The notice was filed under a territorial act, approved December 10, 1864 afterwards embodied in sections 4552-4556 of the Revised Statutes of Idaho, of 1887, relating to "Possessory Actions for Public Lands," and providing that

Any person * * * occupying and settled upon, any of the public lands of the United States in this Territory, for the purpose of cultivating or grazing the same, may commence and maintain any action for interference with or injury to, his possession
92 of such land against any person interfering with or injuring the same.

It is further provided therein that the claimant shall file in the county recorder's office an accurate description of his possessory claim.

White's notice concluded with the statement: "I make this location under the laws of the Territory of Idaho, pursuant to an act entitled an act prescribing the mode of maintaining and defending possession action on the public lands in the Territory of Idaho, approved December 10, 1864." The purpose of the notice, as will be seen, was not to define any claim White might assert under the federal laws, but to enable him to protect, under the local laws, any invasion of his possessory claim. Aside, however, from the special purpose which the notice was intended to subserve, it cannot be held that a notice of a possessory claim, given prior to survey in the field, will estop the settler from afterwards making his entry conform to

the legal subdivisions in such manner as to include the land actually settled upon by him, as against settlers whose rights were acquired after such survey.

This being true, the right of White is superior to that of the townsite claimants, and Melder's contest is dismissed and White's entry held intact.

The departmental decision under review is hereby vacated, and your office decision of February 6, 1897, reversed, and the case will be disposed of in accordance with the views herein expressed.

93 The papers are herewith returned.

Very respectfully

(Signed) E. A. HITCHCOCK, *Secretary.*

EXHIBIT "B"

30—497 DEPARTMENT OF THE INTERIOR,
WASHINGTON.

F. L. C. V. B. E. J. H. S. V. B.

MAY 1, 1903.

HENRY MEDLER, Trustee for Clark's Fork Townsite, Occupants,
vs.
JOHN E. WHITE.

The Commissioner of the General Land Office.

SIR: The tract of land involved herein is the N. W. ¼ of Sec. 2, T. 55 N., R. 2 E., Cœur d'Alene, Idaho, land district, and is here on appeal from your office decision of November 18, 1902, in favor of the defendant.

It appears that on November 27, 1895, the day on which the townsite plat of survey was filed in the local office, John E. White made homestead entry for the above described tract together with lots 5 and 6 and N. E. ¼ of S. W. ¼ of said section.

94 Subsequently, on the same day, Henry Melder, Probate Judge of Kootenai County, Idaho, applied as trustee for certain townsite settlers to file a townsite declaratory statement with a plat of the town of Clark's Fork attached for said N. W. ¼ of S. W. ¼ of Sec. 2, which was rejected for conflict with White's entry.

January 8, 1896, said Melder, for the benefit of the townsite claimants filed a contest against White's entry, as to said tract, alleging that the same had been occupied and used for townsite purposes ever since the year 1884, and that White's entry thereof was made for the purpose of speculation.

May 14, 1896, as a result of a hearing had in the case, the local officers decided that White's entry should be held intact, provided he would agree to convey, after patent, about two acres of the land to the probate judge for the benefit of the townsite occupants; from which both parties appealed.

February 6, 1897, your office held White's entry for cancellation as to the entire tract in controversy, which decision was subsequently adhered to on motion for review. Upon appeal therefrom by White, the department, August 31, 1898, (not reported) affirmed said decision.

May 22, 1899 (28 L. D. 412) the department, on review, vacated its previous decision, and reversed the decision of your office, holding that White's rights were superior to those of the townsite claimants and that his entry should remain intact.

95 Subsequently the department refused to grant a rehearing but stated in its decision therein that your office was not precluded from directing an inquiry, in the nature of a new contest, if a new cause of complaint had been presented. In promulgating said departmental decision, however, your office, on July 11, 1900, denied the application for a rehearing, from which an appeal was taken to the department by the townsite claimants.

In the meantime, White had, on November 29, 1897, offered final proof under his homestead entry, against which the townsite claimants filed a protest, in which it was alleged that a mineral location had been made on a portion of the land covered by his entry. White thereupon relinquished that portion of the land in conflict with the mineral location, and the same having been segregated by survey, final certificate was issued to him, in which the land is described as the N. W. ¼ of S. W. ¼ and lots 5, 6 and 7 of Sec. 2, T. 55, N. R. 2 E.

December 20, 1901, the department, upon consideration of the appeal of the townsite claimants from the action of your office of July 11, 1900, denying a rehearing, and in view of affidavits that had been presented alleging that White had not made entry of the land as a homestead in good faith, but for purposes of speculation, directed that a further hearing be had, to be limited to seven specific inquiries which are set forth in full in your office decision.

96 The former departmental decisions in the case were withdrawn and further action upon White's homestead entry suspended.

The hearing was held at the local office, commencing March 26, and continuing through April 2, 1902, special agent L. L. Sharp having been directed to act therein in place of the register who had been one of the attorneys for the townsite claimants at the former hearing.

July 25, 1902, said special agent and the receiver of the local office, held in substance, that the department had in its decision of May 22, 1899, *supra*, decided the question of priority of settlement and the effect of settlement upon the railroad company's right of way; that the only questions to be considered were those raised by the charges against White's good faith, and that said allegations were not supported by the evidence. It was, therefore, recommended that the townsite claimant's protest be dismissed; that White's entry be relieved from suspension and the same passed to patent, from which appeal was taken.

November 18, 1902, your office decision held that:

Inasmuch as the Secretary of the Interior in ordering the rehearing in this case did not revoke any ruling of law previously laid down, and directed that the evidence to be taken at the second hearing should be confined to certain questions raised by the affidavits filed in support of the application made by the townsite claimants for the new hearing, this office does not feel that it would be
97 justified in reaching any decision contrary to the views expressed by the department in the decision of May 22, 1899, (*supra*), unless such conclusion can be based upon the evidence submitted in accordance with the order for the second trial.

It was also held therein that the finding of facts from the testimony elicited at the second hearing, by the local officers, was substantially correct, and that the townsite claimants had failed to establish their charges against the entryman, White, and the decision of the local officers dismissing the protest against said entry was affirmed.

An appeal has been taken from said decision to the department, in which it is claimed, substantially, that your office erred in not holding that the evidence taken at both hearings, taken together, clearly establishes the fact that the land in controversy has been continuously used for purposes of trade and business ever since long prior to the initiation of White's homestead; also in not finding from the evidence submitted at the rehearing that the charges made against White's entry had been proven, and in not holding said entry for cancellation *in toto*, or at least in not directing the segregation of the lots occupied by the townsite claimants from said homestead entry.

It is disclosed by the record herein that the Northern Pacific railroad was built across the forty acre tract in controversy long
98 prior to the government survey in the field, and prior to any settlement thereon, said road having a grant of two hundred feet in width on each side of the center of its track for right of way. The greater part of said tract is south of the railroad, and it was shown at the first hearing had in the case that the homestead entryman, White, and M. P. Whitcomb, one of the townsite claimants, were settlers south of the railroad on said tract prior to the survey in the field in 1893, and that at the time of said survey several parties were located on the north side of the road upon the company's right of way, three or four of whom, including Whitcomb, were engaged in business thereon. These parties north of the road were located upon lots that had been platted and leased to them in 1889 by one Nagel, who was the first settler there and who then intended to take the land north of the road as a homestead. This purpose, however he subsequently abandoned, and took as his homestead land adjoining on the north. Said lots were, it would seem, laid out by Nagel, supposing that the company's right of way only extended a hundred feet each way from the center of its track, and while the back end of said lots extended about 15 feet onto the land in controversy, about 100 feet thereof was on the right of way, and the buildings used and occupied as hereinbefore stated were on the right of way. The majority of these buildings were in 1894 and 1895 moved back off the right of way onto the land in controversy.

White made settlement on said tract, south of the railroad,
99 and built a house thereon in 1891, moved into the same early in 1892, and has ever since resided there, and has made valuable improvements.

In the departmental decision of May 22, 1899 (28 L. S. 412), the evidence submitted at the first hearing was very fully and carefully considered, together with the law governing the case, and it was therein held (page 421) that:

At the time of the survey in the field White was the only settler on the subdivision except Whitcomb, the other parties at that time being located on the right of way, and as to them White's right, as a prior settler, attached to the entire tract from such time. Any right Whitcomb may have had as a homestead settler by reason of his settlement before survey in the field is lost by his failure to assert the same under the homestead law.

Regarding the claim made at the first hearing by the townsite applicants that the railroad company held the strip granted for right of way as a mere easement, and that settlement upon it which did not interfere with the operations of the road by the company extended to the remainder of the tract on which settlement was made, it was held in said departmental decision (syllabus) that:

The Northern Pacific R. R. Co. by section 2, act of July 2, 1864, holds its right of way under a qualified fee, which, so long as the qualification annexed is not at an end, confers upon the company the exclusive right of possession; a settlement, therefore upon
100 said right of way is not a settlement upon the public land and confers no right or claim to adjoining public land.

As the rehearing was limited to seven specific inquiries, none of which related to priority of settlement rights, that question, together with the foregoing question of law regarding the effect of the settlement of the townsite claimants upon said railroad company's right of way, may be considered as determined by said departmental decision of May 22, 1899, and need not be considered herein.

Of said seven inquiries the first four were, in substance, to ascertain what portion of the land in controversy was included within the claimed townsite settlement, the character of the occupancy thereof and improvements at the time White's entry was allowed, November 27, 1895; also as to the same at the time of the submission of his final proof, November 29, 1897; and the seventh related to the number of inhabitants and the value of their improvements on each of said dates.

The testimony covering these inquiries is to some extent conflicting but the preponderance of the testimony submitted at both hearings goes to show that at the date of White's establishment of residence all of the business houses and all but one of the townsite occupants' residences were located on the right of way, except Whitcomb's which was south of the road. At the time of White's
101 entry, as well as at the time of the submission of final proof, the buildings, except the hotel, saloon and store-building of one Roberts, had been taken off the right of way onto the land in controversy, and improvements had been made thereto, to the ex-

f about $1500 in value, chiefly to the store of Whitcomb Bros.
agel.

arding the number of inhabitants on the claimed townsite set-
t, there were shown to have been between 45 and 50 at the
date and about the same number at the latter, including those
right of way; and the value of their improvements at the date
ite's entry, as found by the local office, from $7000 to $8000.

fifth and sixth inquiries of the order for said rehearing were
st important ones, as they provided for ascertaining the truth
tters alleged in the affidavits filed by the townsite claimants,
e to White's having induced parties to occupy lots within the
l townsite settlement, or having acquiesced in such occupancy,
n the date of his homestead entry and that of the submission
final proof; also relative to his having, within said period, con-
to dispose of any of said lots, upon obtaining title thereto
his entry, or having by such means induced any one to refrain
articipating in the assertion of the claim of the townsite people.
le an attempt was made to prove these charges, the result was
a failure. Two or three witnesses testified to conversations
alleged to have been had with White whereby they were in-
duced to build upon and improve some portion of the lands
troversy but the preponderance of the testimony tends to dis-
aid claims and shows that White repeatedly notified parties, in
ases in writing, and in others verbally, not to build upon said
s he claimed the same under his homestead entry.

Department is of opinion from an examination of the testi-
taken at both hearings, that White's entry was made in good
nd entertaining the views herein expressed there is no occa-
consider the claim of the townsite applicants that in case
test against White's entry should not be sustained as a whole,
s occupied by the townsite settlers should be segregated from
try and the title thereto be confirmed to said settlers.

r office decision dismissing the contest against White's entry,
ned. The former departmental decisions which were with-
by departmental action of December 20, 1901, are hereby
ed, and White's final entry relieved from suspension. The
are herewith returned.

Very respectfully, THOMAS RYAN,
Acting Secretary.

(Title of Court and Cause.)

Order for Substitution.

eading and filing the stipulation of the parties therefor, and
aring to the satisfaction of the court therefrom that since the
ncement of the above-entitled action defendant Moses P.
nb has died intestate; that there has been appointed by the
court of Kootenai county, state of Idaho, a special admin-
of and for the estate of said deceased, to-wit, L. H. Whitcomb
the same person as Roy Whitcomb, one of the defendants

in said action); and that the only heirs of said deceased are Martha Whitcomb, widow of said deceased, and said L. H. Whitcomb (or Roy Whitcomb), son of said deceased, both said Martha Whitcomb and L. H. Whitcomb (Roy Whitcomb) being now parties defendant to said action, and the court being fully advised in the premises, it is by the court.

Ordered that said L. H. Whitcomb, as special administrator of the estate of said Moses P. Whitcomb, deceased, and said Martha Whitcomb and L. H. Whitcomb (Roy Whitcomb), as sole and only heirs at law of said deceased, be, and they are hereby, substituted as parties defendant in the place and stead of said deceased, Moses P. Whitcomb; and that the answer of said special administrator shall be deemed the answer of the administrator or administratrix when one is appointed for said estate.

104 Done at chambers, at Harrison, Kootenai County, Idaho, this 10th day of October, 1904.

R. T. MORGAN,
District Judge.

Filed Oct. 14, 1904.

(Title of Court and Cause.)

Order Permitting Filing of Supplemental Complaint.

Now on this day the motion and application of plaintiffs for leave to file a supplemental complaint herein, showing facts accruing since the filing of the original and amended complaint herein, and good cause being shown and it appearing to the court that said motion and application being duly made and noticed, and defts. or either of them, not appearing or making any objection and the court being fully advised, in the premises.

It is therefore ordered that said motion and application be and the same is hereby granted and allowed.

It is further ordered that the proposed supplemental complaint filed at the time of filing said motion and application be and the same is hereby allowed to be filed and the same is hereby ordered filed by the clerk, and if the same shall not be marked filed by the clerk it shall be deemed filed.

105 Done in open court this April 17th, 1905.

R. T. MORGAN, *Judge.*

Filed April 17, 1905.

(Title of Court and Cause.)

Supplemental Complaint.

Come now the above-named plaintiffs, and for supplemental complaint in this action, and for the purpose of showing to the court facts which have transpired since the amended complaint was filed in this action, allege as follows:

I.

That on the 3rd day of November, 1903, judgment was rendered and entered in that certain action in the district court of the first judicial district of Idaho in and for the county of Kootenai, in which said action the plaintiffs in this action were plaintiffs and defendants M. W. Caldwell and James Canning in this action and one H. D. Johnston and one F. S. Lansley were defendants, and which said action was and is numbered 1198, which said judgment was and is in favor of plaintiffs and against defendants in said action. That in said action numbered 1198 the issues were made up by amended complaint and answers, which issues were as to the right of possession and the ownership of a portion of the
106 premises in controversy in this action and described in the amended complaint in this action, to-wit: That particular parcel or plat of ground lying west of and immediately adjoining the premises known as the Thibadeau residence and used prior to the 4th of December, 1901, as a garden by Mrs. M. D. Thibadeau, the said premises being situated on the north side of the track of the Northern Pacific Railway, in the northwest quarter of the southwest quarter of section two, township fifty-five north, range two east, Boise Meridian, in Kootenai county, state of Idaho.

II.

That after said issues were made up said case was tried and heard, and the court made, filed and entered findings of fact and conclusions of law and judgment, finding and determining the issues in said action in favor of plaintiffs and against said defendants M. W. Caldwell and James Canning, and H. D. Johnston and F. S. Langley, which said findings, conclusions and judgment are, in effect, that the plaintiffs were and still are the owners and entitled to the sole and immediate and exclusive possession of the property hereinbefore described, and that the defendants in said action, M. W. Caldwell and James Canning, who are also defendants in this action, did not at the time of the commencement of said action number 1198 or at all have any right, title or interest therein or thereto or any right to the possession thereof or any part thereof.

107 III.

That an appeal was taken from said judgment in said action numbered 1198 to the supreme court of the state of Idaho, and the said judgment of the district court aforesaid was affirmed by said supreme court on the 31st day of December, 1904, and a remittitur in said action was sent down from said supreme court to said district court, and which said remittitur was filed in said district court on the — day of January, 1905. That the said judgment in said action numbered 1198 has become final and is *res adjudicata* as to the property hereinbefore described as to the defendants in this action who were defendants in said action numbered 1198.

Wherefore, Plaintiffs pray judgment as heretofore prayed, and for such relief as the facts hereinbefore set forth entitle them to.

JNO. E. WHITE,
ROBERTA B. WHITE,
Plaintiffs.

H. M. STEPHENS,
Attorney for Plaintiffs.

Duly verified. Filed April 1, 1905.

(Title of Court and Cause.)

Findings.

The above-entitled action came on regularly for hearing
108 and trial before the court without a jury, a jury having been waived by written consent of the respective attorneys of the parties herein filed with the clerk of the court, and also by consent of the parties to this action made in open court and entered on the minutes of the court, which said trial came on for hearing at chambers, by stipulation, as authorized and required by law, at Harrison, in the county of Kootenai, state of Idaho; and the respective parties appeared a part of them in person and all of them by their respective counsel; and the court, having heard the evidence and the arguments of counsel, took the said case under advisement, and does now make and file herein findings of fact, and conclusions of law, and judgment and decree in writing, as authorized and required by law.

Findings of Fact.

The court finds the facts, from the evidence, to be as follows:

I.

That plaintiffs John E. White and Roberta B. White, now are, and at all times hereinafter mentioned were, husband and wife.

II.

That defendants Moses P. Whitcomb and John B. Whitcomb were at the time of the commencement of this action and at all times thereafter until the death of said Moses P. Whitcomb,
109 on the 19th day of May, 1904 co-partners, doing business under the firm name and style of Whitcomb Brothers.

III.

That defendants Moses P. Whitcomb and Martha P. Whitcomb were at the time of the commencement of this action and at all times thereafter until the death of said Moses P. Whitcomb, as aforesaid, husband and wife.

IV.

at defendants John Reed and Courtney D. Reed now are, and the times hereinafter mentioned were, husband and wife.

V.

at defendants M. W. Caldwell and Alice Caldwell now are and the times hereinafter mentioned were husband and wife.

VI.

at defendant John Fleming at the time of the commencement s action was, and at all times since has been, and now is, single nmarried.

VII.

at defendant Frank Allen at the time of the commencement s action was, and at all times since has been, and now is, single nmarried.

VIII.

That defendant Mrs. —— Casey is now, and at all the times hereinafter mentioned was single and unmarried.

IX.

at defendants William Johnston and Hilma Johnston now nd at all the times hereinafter mentioned were husband and

X.

at defendants A. H. Hasselroth and Wilhelmina Hasselroth re and at all times hereinafter mentioned were husband and

XI.

at defendants George Piatt and Elsie Piatt now are, and at e times hereinafter mentioned were husband and wife.

XII.

t defendants Andrew Paulson and Alvena Paulson now are, all the times hereinafter mentioned were husband and wife.

XIII.

t defendant John Kirke is now, and at all the times here- mentioned was single and unmarried.

XIV.

t defendants Brocklin Dougharty and Nora Dougharty now nd at all the times hereinafter mentioned were husband and

111 XV.

That defendants Luke Cotter and Sadie Cotter now are, and at all times hereinafter mentioned were husband and wife.

XVI.

That defendants Walter Fleming and Rose Fleming now are, and at all the times hereinafter mentioned were husband and wife.

XVII.

That defendant Charles Schindler is now, and at all times hereinafter mentioned was single and unmarried.

XVIII.

That defendants Jason Edwards and Julia Edwards now are, and at all the times hereinafter mentioned were husband and wife.

XIX.

That defendants Gordon Dougharty and Ida Dougharty now are, and at all the times hereinafter mentioned were husband and wife.

XX.

That defendant Mrs. Emma Lloyd is now and at all the times hereinafter mentioned was single and unmarried.

XXI.

112 That defendants Le Roy H. Whitcomb and Nannie Whitcomb now are, and at all the times hereinafter, mentioned were husband and wife.

XXII.

That defendants James Canning and Blanch Canning now are, and at all the times hereinafter mentioned were husband and wife.

XXIII.

That defendant John B. Whitcomb is now and a- all the times hereinafter mentioned was single and unmarried.

XXIV.

That after the commencement of this action, and on the 19th day of May, 1904, defendant Moses P. Whitcomb died intestate; that defendant LeRoy H. Whitcomb is the duly appointed, qualified and acting administrator of the estate of said Moses P. Whitcomb, deceased; that the sole and only heirs at law of said deceased are defendant Martha Whitcomb, widow of said deceased, and defendant LeRoy H. Whitcomb, son of said deceased; that said administrator

said heirs at law of said deceased have been made and are ies defendant in and to this action, pursuant to stipulation of parties, plaintiffs and defendants, filed herein, and pursuant to er of this court duly made and entered herein.

XXV.

That the plaintiffs now are and at all the times hereinafter mentioned were the owners in fee and entitled to the immediate and exclusive possession of the following described tract, e and parcel of land, situated, lying and being in Kootenai nty, state of Idaho, to-wit: the northwest quarter of the south- quarter and lots (5), six (6) and seven (7) of section two (2) ownship fifty-five (55) north, range two (2) east, Boise meridian.

XXVI.

hat defendants were at the time of the commencement of this on, and at all times since have been, and now are, wrongfully unlawfully in possession of small portions of the tract above ntioned and described, and have used and occupied the same for ng period of time.

XXVII.

hat said premises and property were acquired by plaintiffs by mestead entry, and final proof was made on the 27th day of ember, 1897, and patent issued therefor on July 14th, 1903; that ntiffs were unable to bring suit in ejectment against defendants ny other suit for possession of those portions of the premises e mentioned and described, occupied by the defendants or either hem, until patent issued, because of contest and litigation pend- in the Land Department of the United States, which was only lly determined a few days before patent issued.

XXVIII.

hat prior to the commencement of this action, and on or about 15th day of May, 1903, defendant Gordon Dougharty moved the premises above mentioned and described permanent and ng improvements of the value of two thousand five hundred ars.

XXIX.

hat in truth and in fact, while plaintiffs were in the constructive legal possession of the whole of the premises above mentioned described when patent issued on the 14th day of July, 1903, defendants were at the time of the commencement of this action, at all times since have been, and now are, in the physical and al possession of small portions thereof.

XXX.

That plaintiffs are entitled not only to the possession of the premises occupied by the defendants and each of them, but also to possession of the improvements upon the whole of the said property hereinbefore first described, and particularly the improvements upon the various portions above mentioned that the defendants and each of them occupy or have possession of.

XXXI.

That plaintiffs and their grantors were and have been
115 seized and possessed of the property in question in this action within five years before the commencement of this action; and on the 14th day of July 1903, when patent issued, defendants ousted plaintiffs from the possession of portions of the premises above described.

XXXII.

That the reasonable value of the use and occupation of the premises admitted in the answer to have been occupied by defendants Moses P. Whitcomb and John B. Whitcomb as co-partners, and John B. Whitcomb as surviving partner of the firm composed of Moses P. Whitcomb and John B. Whitcomb, doing business as Whitcomb Brothers, for the time for which the plaintiffs are entitled to recover for use and occupation of said property, exclusive of improvements, is twenty dollars.

That the reasonable value of the use and occupation of the premises admitted in the answer and cross complaint to have been occupied by defendants Moses P. Whitcomb and Martha Whitcomb, his wife, and defendants LeRoy H. Whitcomb and Martha Whitcomb, as heirs at law of Moses P. Whitcomb, deceased, and Le Roy H. Whitcomb, as administrator of the estate of Moses P. Whitcomb, deceased, for the time for which the plaintiffs are entitled to recover for use and occupation of said property, exclusive of improvements, is ten dollars.

116 That the reasonable value of the use and occupation of the premises admitted in the answer and cross complaint to have been occupied by defendants John Reed and Courtney D. Reed, his wife, for the time for which the plaintiffs are entitled to recover for use and occupation of said property, exclusive of improvements, is ten dollars.

That the reasonable value of the use and occupation of the premises admitted in the answer and cross complaint to have been occupied by defendants M. W. Caldwell and Alice Caldwell, his wife, during the time for which the plaintiffs are entitled to recover for use and occupation of said property, exclusive of improvements, is ten dollars.

That the reasonable value of the use and occupation of the premises admitted in the answer and cross complaint to have been occupied by defendants William Johnston and Hilma Johnston, his wife, during the time for which the plaintiffs are entitled to recover

for use and occupation of said property, exclusive of improvements, is ten dollars.

That the reasonable value of the use and occupation of said premises admitted in the answer and cross complaint to have been occupied by defendants A. H. Hasselroth and Wilhelmina Hasselroth, his wife, during the time for which the plaintiffs are entitled to recover for use and occupation of said property, exclusive of improvements, is ten dollars.

117 That the reasonable value of the use and occupation of the premises admitted in the answer and cross complaint to have been occupied by defendants George Piatt and Elsie Piatt, his wife, during the time for which the plaintiffs are entitled to recover for the use and occupation of said property, exclusive of improvements, is ten dollars.

That the reasonable value of the use and occupation of the premises admitted in the answer and cross complaint to have been occupied by defendants Andrew Paulson and Alvena Paulson, his wife, during the time for which the plaintiffs are entitled to recover for use and occupation of said property, exclusive of improvements, is ten dollars.

That the reasonable value of the use and occupation of the premises admitted in the answer and cross complaint to have been occupied by defendant John Kirke during the time for which the plaintiffs are entitled to recover for the use and occupation of said property, exclusive of improvements, in ten dollars.

That the reasonable value of the use and occupation of the premises admitted in the answer and cross complaint to have been occupied by defendants Brocklin Dougharty and Nora Dougharty, his wife, during the time for which the plaintiffs are entitled to recover for use and occupation of said premises, exclusive of improvements, is ten dollars.

That the reasonable value of the use and occupation of the
118 premises admitted in the answer and cross complaint to have been occupied by defendants Luke Cotter and Sadie Cotter, his wife, during the time for which the plaintiffs are entitled to recover for use and occupation of said premises, exclusive of improvements, is ten dollars.

That the reasonable value of the use and occupation of the premises admitted in the answer and cross complaint to have been occupied by defendants Walter Fleming and Rose Fleming, his wife, during the time for which the plaintiffs are entitled to recover for use and occupation of said property, exclusive of improvements, is ten dollars.

That the reasonable value of the use and occupation of the premises admitted in the answer and cross complaint to have been occupied by defendant Charles Schindler during the time for which the plaintiffs are entitled to recover for use and occupation of said property, exclusive of improvements, is ten dollars.

That the reasonable value of the use and occupation of the premises admitted in the answer and cross complaint to have been occupied by defendants Jason Edwards, and Julia Edwards, his wife, during the time for which the plaintiffs are entitled to recover for use and occupation of said property, exclusive of improvements, is ten dollars.

That the reasonable value of the use and occupation of the premises admitted in the answer and cross complaint to have been occu-
119 pied by defendants Gordon Dougharty and Ida Dougharty, his wife, during the time for which the plaintiffs are entitled to recover for use and occupation of said property, exclusive of improvements, is ten dollars.

That the reasonable value of the use and occupation of the premises admitted in the answer and cross complaint to have been occupied by defendant Mrs. Emma Lloyd during the time for which plaintiffs are entitled to recover for use and occupation of said property, exclusive of improvements, is ten dollars.

That the reasonable value of the use and occupation of the premises admitted in the answer and cross complaint to have been occupied by defendant John H. Whitcomb during the time for which plaintiffs are entitled to recover for use and occupation of said property, exclusive of improvements, is ten dollars.

That the reasonable value of the use and occupation of the premises admitted in the answer and cross complaint to have been occupied by defendant Frank Allen during the time for which plaintiffs are entitled to recover for use and occupation of said property, exclusive of improvements, is ten dollars.

That the reasonable value of the use and occupation of the premises admitted in the answer and cross complaint to have been occupied by defendant T. B. McWilliams during the time for which plaintiffs are entitled to recover for use and occupation of said property, exclusive of improvements, is ten dollars.

120 XXXIII.

That defendants John Reed and Courtney D. Reed, his wife, purported to purchase the improvements upon the premises and property which they are wrongfully withholding from plaintiffs, with full knowledge and notice of all the rights of the plaintiffs herein, and paid therefor a very small sum compared to the actual value thereof, and having such knowledge, and knowing that plaintiffs owned said premises and property and the improvements thereon, and purchasing the same as aforesaid, should pay for the reasonable use of said improvements in addition to the land, which reasonable value for the use and occupation of said property and improvements is at least twenty-five dollars per month from the time they purchased the same, to-wit, from the 1st day of July, 1902.

XXXIV.

That the reasonable value of the improvements moved off the premises claimed by defendants Gordon Dougharty and Ida Dougharty, his wife, was and is two thousand five hundred dollars, which sum the plaintiffs are entitled to recover from defendants Gordon Dougharty and Ida Dougharty, his wife.

XXXV.

That there was a contest in the United States Land Office and the Department of the Interior of the United States concerning said

premises and property between the plaintiffs and the defend-
nts and their predecessors in interest, known and designated
s the town-site claimants, in which contest plaintiffs were
ul, and the findings of fact of said Department and of the
hereof were and are favorable to the plaintiffs and against the
nts and their predecessors in interest and off of said townsite
ts.

XXXVI.

the findings of fact in said contest and by said United States
were and are as follows:
decision of the secretary of Interior of May 22, 1899 and of
t secretary of May 1st 1903 are inserted in this finding being
l with exhibit "A" and "B" to the answer to the cross com-
ranscript pages 71 to 102, folios 199 to 293, and reference is
made to the same without reprinting here.)

XXXVII.

the finding or findings of fact or of any mixed question of
l law was ever made, determined or decided inconsistent with
ings of fact hereinbefore set forth.

XXXVIII.

the officers of the Interior Department did not exclude any
ny, and there was in said land office and said Department a
r and complete hearing

XXXIX.

the officers of said Interior Department of said land office or
either of them were not guilty of any fraud or any unlawful
.

Conclusions of Law.

court finds as conclusions of law:

I.

the plaintiffs are the owners in fee simple of the property in-
in this action and of all improvements situated upon the said
ate, and are entitled to have the immediate, sole and exclusive
on of said property and the whole and every part thereof,
entitled to recover the same, or any part thereof held by the
nts or either of them, from the defendants and each of them.

II.

plaintiffs are entitled to have against the defendants herein
nt for the use and occupation of said premises or such portions
as have been occupied and held by the defendants, as shown
indings of fact herein.

III.

That plaintiffs are entitled to a several and separate judgment against defendants John Reed and Courtney D. Reed his wife,
123 for the use and occupation of the premises held and wrongfully detained by said defendants.

IV.

That plaintiffs are entitled to judgment against defendants Gordon Dougharty and Ida Dougharty, his wife, for the value of the improvements removed from a portion of the premises in controversy as shown by finding of fact numbered twenty-eight (XXVIII).

V.

That plaintiffs are entitled to a joint and several judgment against the defendants and each of them for their costs and disbursements in this action.

VI.

That the findings of fact and all questions of mixed law and fact made or found by the officers of the Department of the Interior are binding and conclusive upon this court and no allegation has been made in the answer of the defendants or the cross complaint of the defendants or any evidence offered which authorizes this court to reinvestigate or relitigate the facts or any fact of this case which were raised or attempted to be raised by the answer or cross complaint or either of them herein and the only issues of fact that are open in this court to determination between the plaintiffs and defendants in this action are those relating to the matter of the use and occupation by the defendants of the premises in controversy or such portions
124 thereof as have been by the defendants severally occupied and wrongfully detained and held by the defendants jointly or severally.

VII.

That the pleadings of the defendants herein or the evidence offered by them or either thereof are not sufficient to authorize, permit or warrant this court to reinvestigate or relitigate the questions of fact or any question of fact which have heretofore been presented to and litigated in or determined by the Department of the Interior or which might have been presented or litigated in or determined by said Department or the officers thereof.

VIII.

That the patent of the plaintiffs in this action transferred to them the legal fee-simple and indefensible title.

IX.

That the defendants or either of them have no right claim, title or interest in or to the property involved in this action or any part thereof; and that the claims of defendants and each of them to the

said property or any part thereof or of any other person by or through the defendants or any other person claiming under the alleged townsite claimants or any or either of them, under the laws of Congress, or any or either of them, are and each of them is
125 without foundation therefor and of no force or effect whatsoever.

X.

That the improvements upon the property in controversy and involved in this action or any part thereof placed thereon by the defendants or either of them, or any person by, through or under whom the defendants or either of them hold or claim, or pretend to hold or claim, or put or placed upon said property by any of said alleged townsite claimants, being to and are the property of the plaintiffs in this action.

XI.

That upon the cross complaint of the defendants herein and the answer of the plaintiffs to said cross complaint, plaintiffs are entitled to have the title of and to said property involved in this action and the whole and every part thereof quieted, and any and every cloud cast or put thereon by the defendants or either of them removed and for naught held, and all the adverse claims of defendants or either of them, or any person claiming or to claim or hereafter claiming by, through or under the defendants or either of them, for naught held, cancelled and settled, and the title of the plaintiffs in and to the property and premises aforesaid and the whole and every part thereof, together with the improvements thereon, quieted in the plaintiffs and freed from any and every claim of the defend-
126 ants and any any every person claiming or to claim by, through or under the defendants or either of them.

Done in open court, this eleventh day of November, 1905.

R. T. MORGAN,
District Judge.

(Title of Court and Cause.)

Judgment and Decree.

The above-entitled action came on regularly for hearing and trial by and before the judge of the above-named court, sitting at chambers at Harrison, in Kootenai county, state of Idaho, on the 11th day of July, 1905, without a jury, a jury having been waived by written stipulation and consent of the respective attorneys of the parties herein filed with the clerk of the court, and also by consent of the parties to this action made and given in open court and entered on the minutes of the court, and the parties hereto, by their respective attorneys, having stipulated and consented in writing to the said hearing and trial at chambers at said time and place, as authorized and required by law; and the respective parties appeared, a part of them in person and all of them by their respective counsel. And thereupon witnesses were sworn and examined upon the part of the

plaintiffs and the defendants, and after hearing the evidence
127 and arguments of counsel, the court took said case under advisement, and thereafter announced and made oral findings of fact and conclusions of law and directed that findings of fact and conclusions of law in writing be prepared in conformity thereto. And thereafter findings of fact and conclusions of law were duly prepared, examined, signed, made and entered by the court and filed with and by the clerk, which findings of fact and conclusions of law are in favor of the plaintiffs and against the defendants.

Wherefore, By reason of the law and the facts found and conclusion reached and made by the court, it is ordered and adjudged decreed as follows:

I.

That the plaintiffs, John E. White and Roberta B. White, his wife, are the owners in fee simple of the following described tract, piece and parcel of land, situated, lying and being in Kootenai county, state of Idaho, to-wit: the northwest quarter of the southwest quarter and lots five (5), six (6) and seven (7) of section two (2), in township fifty-five (55) north, range two (2) east, Boise meridian, and of all improvements situated upon the said real estate, and are entitled to have the immediate, sole and exclusive possession of said property and the whole and every part thereof, and are entitled to recover the same, or any part thereof held by the defendants or either of them, from the defendants and each of them.

128 II.

That the plaintiffs do have and recover of and from the defendants and each of them the possession of the above described property, and the whole and every part thereof, or such portions thereof as are held by the respective defendants or either of them; and that plaintiffs have restitution thereof from defendants and each of them.

III.

That plaintiffs have and recover of and from defendants John Reed and Courtney D. Reed, his wife, the sum of one thousand and ten dollars, the same being the reasonable value of the use and occupation of the premises held and wrongfully detained by said defendants.

IV.

That plaintiffs have and recover of and from defendants Gordon Dougharty and Ida Dougharty, his wife, the sum of twenty-five hundred and ten dollars, the same being the reasonable value of the use and occupation of the premises held and wrongfully detained by said defendants (exclusive of improvements) and the value of the permanent improvements removed from said premises by said defendants.

V.

That plaintiffs have and recover of and from defendant John B. Whitcomb the sum of twenty dollars, the same being the
129 reasonable value of the use and occupation of the premises (exclusive of improvements) held and wrongfully detained

defendant and by the firm composed of Moses P. Whitcomb
eceased) and John B. Whitcomb, doing business as Whitcomb
s, and of which firm said John B. Whitcomb is the surviving

VI.

plaintiffs have and recover of and from defendants Martha
nb and Le Roy H. Whitcomb, and Le Roy H. Whitcomb as
trator of the estate of Moses P. Whitcomb, deceased, the sum
dollars, the same being the reasonable value of the use and
ion of the premises held and wrongfully detained by said
P. Whitcomb and Martha Whitcomb, his wife, and said Le
Whitcomb, as said administrator, and Martha Whitcomb and
H. Whitcomb, as heirs at law of said Moses P. Whitcomb,
l, exclusive of improvements.

VII.

plaintiffs have and recover of and from defendants M. W.
l and Alice Caldwell, his wife, the sum of ten dollars, the
ing the reasonable value of the use and occupation of the
s held and wrongfully detained by said defendants, exclusive
ovements.

VIII.

That plaintiffs have and recover of and from defendants
William Johnston and Hilma Johnston, his wife, the sum of
en dollars, the same being the reasonable value of the use
upation of the premises held and wrongfully detained by said
nts, exclusive of improvements.

IX.

plaintiffs have and recover of and from defendants A. H.
oth and Wilhelmina Hasselroth, his wife, the sum of ten
the same being the reasonable value of the use and occupa-
the premises held and wrongfully detained by said defend-
clusive of improvements.

X.

plaintiffs have and recover of and from defendants George
d Elsie Piatt, his wife, the sum of ten dollars, the same being
onable value of the use and occupation of the premises held
ongfully detained by said defendants, exclusive of improve-

XI.

plaintiffs have and recover of and from defendants Andrew
and Alvena Paulson, his wife, the sum of ten dollars, the
ing the reasonable value of the use and occupation of the
s held and wrongfully detained by said defendants exclusive
ovements.

XII.

That plaintiffs have and recover of and from defendant
131 John Kirke the sum of ten dollars, the same being the reasonable value of the use and occupation of the premises held and wrongfully detained by said defendant, exclusive of improvements.

XIII.

That plaintiffs have and recover of and from defendants Brocklin Dougharty and Nora Dougharty, his wife, the sum of ten dollars, the same being the reasonable value of the use and occupation of the premises held and wrongfully detained by said defendants, exclusive of improvements.

XIV.

That plaintiffs have and recover of and from defendants Luke Cotter and Sadie Cotter, his wife, the sum of ten dollars, the same being the reasonable value of the use and occupation of the premises held and wrongfully detained by said defendants, exclusive of improvements.

XV.

That plaintiffs have and recover of and from defendants Walter Fleming and Rose Fleming, his wife, the sum of ten dollars, the same being the reasonable value of the use and occupation of the premises held and wrongfully detained by said defendants, exclusive of improvements.

XVI.

That plaintiffs have and recover of and from defendant
132 Charles Schindler the sum of ten dollars, the same being the reasonable value of the use and occupation of the premises held and wrongfully detained by said defendant, exclusive of improvements.

XVII.

That plaintiffs have and recover of and from defendants Jason Edwards and Julia Edwards, his wife, the sum of ten dollars, the same being the reasonable value of the use and occupation of the premises held and wrongfully detained by said defendants, exclusive of improvements.

XVIII.

That plaintiffs have and recover of and from defendant Mrs. Emma Lloyd the sum of ten dollars, the same being the reasonable value of the use and occupation of the premises held and wrongfully detained by said defendant, exclusive of improvements.

XIX.

That plaintiffs have and recover of and from defendant Frank Allen the sum of ten dollars, the same being the reasonable value of the use and occupation of the premises held and wrongfully detained by said defendant, exclusive of improvements.

XX.

That plaintiffs have and recover of and from defendant T. B. McWilliams the sum of ten dollars, the same being the reason-
133 able value of the use and occupation of the premises held and wrongfully detained by said defendant, exclusive of improvements.

XXI.

That plaintiffs have and recover judgment of and from the defendants and each of them for plaintiffs' costs and disbursements herein, taxed at two hundred and five and 45 100 dollars.

XXII.

That execution be issued herein and hereon, appropriate for the restoration and restitution to the plaintiffs herein of the above described premises, or such portions thereof as are held and detained by defendants or either of them, and for the enforcement of the above specified personal judgments against the various defendants as hereinbefore specified.

XXIII.

That the findings of fact and all questions of mixed law and fact made or found by the officers of the Department of the Interior are binding and conclusive upon this court, and no allegation has been made in the answer of the defendants or the cross complaint of the defendants or any evidence offered which authorizes this court to reinvestigate or relitigate the facts or any fact of this case which were raised or attempted to be raised by the answer or cross complaint or either of them herein, and the only issues of fact that were open in
134 this court to determination between plaintiffs and defendants in this action were those relating to the matter of the use and occupation by the defendants of the premises in controversy, or such portions thereof as have been by the defendants severally occupied and wrongfully detained and held by the defendants jointly or severally.

XXIV.

That the pleadings of the defendants herein or the evidence offered by them, or either thereof, are not sufficient to authorize, permit or warrant this court to reinvestigate or relitigate the questions of fact, or any question of fact, which have heretofore been presented to and litigated in or determined by the Department of the Interior, or

which might have been presented to, litigated in or determined by said Department or the officers thereof.

XXV.

That the patent of the plaintiffs in this action transferred to them the legal fee-simple and indefeasible title.

XXVI.

That the defendants or either of them have no right, claim, title or interest in or to the property involved in this action, or any part thereof; and that the claims of defendants and each of them to the said property or any part thereof, or of any other person by or through the defendants or any other person claiming under the alleged townsite claimants or any or either of them, under the
135 laws of Congress, or any or either of them, are, and each of them is, without foundation therefor and of no force or effect whatsoever.

XXVII.

That the improvements upon the property in controversy and involved in this action or any part thereof placed thereon by the defendants or either of them, or any person by, through or under whom the defendants or either of them hold or claim, or pretend to hold or claim, or put or placed upon said property by any of said alleged townsite claimants, belong to and are the property of the plaintiffs in this action.

XXVIII.

That the title of plaintiffs of, in and to the property involved in this action, and the whole and every part thereof, be, and the same is hereby, quieted, and any and every cloud cast or put thereon by the defendants or either of them removed and for naught held; that all adverse claims of defendants or either of them, or any person claiming or to claim, or hereafter claiming, by, through or under the defendants or either of them be, and are hereby, for naught held, canceled and settled; and that the title of the plaintiffs in and to the aforesaid property and premises, and the whole and every part thereof, together with the improvements thereon, be, and the same is
hereby, quieted in the plaintiffs and freed from any and every
136 claim of the defendants and any and every person claiming or to claim by, through or under the defendants or either of them.

Done in open court, this 11th day of November, 1905.

R. T. MORGAN,
District Judge.

Endorsed: Filed Nov. 20, 1905.

(Title of Court and Cause.)

Statement of Case.

In the above-entitled cause the respective plaintiffs seek to recover from the defendants the possession of certain lands and tenements described in the complaint, rental for the use and occupation thereof and to have the title thereto quieted in said plaintiffs.

The cause came on regularly for trial by stipulation of the respective parties, before Hon. R. T. Morgan, Judge of the First Judicial district of the State of Idaho, and of said court, sitting at chambers at Harrison, Idaho, in said county of Kootenai, and proceeded to trial upon the issues raised by the pleadings, on Tuesday, July 11th A. D. 1905, at 2 o'clock p. m. of said day, Mr. H. M. Stephens appearing as counsel for the plaintiffs and Albert Allen and John P. Gray appearing as counsel for the defendants.

Whereupon the following testimony was taken in this
137 cause by the respective parties hereto, and no further or other testimony was taken, given, offered or received, in said suit, other than hereafter set forth:

JOHN E. WHITE, was called and, being duly sworn as a witness on the part of the plaintiffs, testified as follows on examination by Mr. Stevens:

Name, John E. White: am familiar with the land in controversy in this action.

It is understood between counsel for the respective parties that defendants disclaim anything south of the railroad track and east of the county road.

The witness then proceeded as follows:

Am familiar with the conditions of the land across and through which the railroad runs. The land on the north side of the track, more elevated than the land on the south side of the track, and is not subject to overflow. Part of the land on the south side is overflowed every year.

The following question was then propounded to the witness:

Q. What did you raise on the south side, or what have you raised for a number of years past on the south side of the railroad track?

Objected to on the ground that this case is not being tried by comparison of this land with some other land.

138 THE COURT: I do not think it will do any harm to hear this evidence. The Court can determine the real point in issue here, even if there is some immaterial evidence.

To which ruling of the court defendants, by counsel, then and there duly excepted and the exception was allowed by the court.

Thereupon the witness proceeded as follows:

I raised all kinds of vegetables, timothy hay and clover. The land on the north side is good quality and well adapted to raising the things that I have raised on the south side.

Whereupon the following question was propounded to the witness.

Q. What is the quantity and what has been the value of the various things you have raised on the land on the south side, immediately south of the railroad right of way.

Objected to on the ground that it is immaterial; can not go into what this land might have produced; question is what is a fair rental value of the land in question, which must be shown by proving what it could have been rented for if he had owned it.

The COURT: I think we will hear this evidence. We can sift it out.

To which ruling of the court defendants, by counsel, then
139 and there duly excepted and their exception was allowed by the court.

A. Giving as an example on that question, last year was dry, with the poorest crop we ever had, and off one acre of cabbage I sold and received the money, three hundred and ninety one dollars; off one acre of rutabagas I got four hundred and eighty dollars. I never sold any timothy, but it was worth twenty dollars a ton and I believe I made about two tons to the acre.

Q. What does it cost to raise timothy? What is the actual cost per acre—per ton, to raise, harvest and market timothy hay?

Mr. ALLEN: All under our objection.

The COURT: Yes.

A. Well, after the ground is fixed, seeded, there is very little cost except cutting and baling it, which is about, I think five dollars, and ten would be an outside price, that is for cutting and baling.

The witness then proceeded as follows:

As to the cost per acre of rutabagas and cabbage, will say, that is not a very expensive crop. I think, as near as I can get it, that ten dollars an acre would cover all the expense of raising the crop, and harvesting it and marketing it, about five dollars an acre I guess; cabbage about the same. As to potatoes, what I have actually
140 raised on this ground, what has been the cost of raising them and what they were worth when raised, will say. As I stated before, last year was the poorest crop we ever had, I raised 150 sacks, weighing 100 pounds to the sack. I only had about an acre and a half. I can only approximate the cost of raising them; suppose it would be about ten dollars an acre to raise them, and, say ten cents a sack to gather them; well to raise them and market them it would be about fifteen cents a sack because I have to pay three and a half cents apiece for sacks. The market price for potatoes in that vicinity since November 1897, has ranged from sixty five cents to a dollar and a dollar and a half. And I believe at the present time. I think I heard one man say he expected to get a dollar eighty cents a hundred at this time. The average price for these years has been, I think, about seventy-five cents a hundred.

I have not been able to farm the land involved in this controversy lying on the north side of the railroad track. As to whether it

ould be better for some things than the land on the south side of
e railroad track, will say, it would be much better, on account of
ver overflowing, for early crops. It is no more productive. The
natters there, the defendants in this case, have kept me from the
tual possession of the land north of the railroad track.
I remember the issuance of an injunction by this court with ref-
erence to the removal of buildings from this property.
I Gordon Dougharty's building was removed after the injunc-
tion was served by telephone. Gordon Dougharty removed it.
The following question was then propounded to the witness:
Q. In the land office proceedings what did Mr. Dougharty say
t building was worth?

Objected to on the ground that it is not the best evidence.
The objection was overruled. To which ruling of the court de-
dants, by counsel, then and there duly excepted and their excep-
n was allowed by the court.

A. I am not certain, but I think his testimony was that his store
lding and hotel were worth three thousand or thirty-five hundred
lars.

The witness then proceeded as follows: Those were the buildings
t were removed. They were not removed by or with my consent.
id all I could to restrain him from moving them.
As to what is the value of the products of the land in controversy
med by the defendants west of the county road on the north
and south side of the railroad track, each year, over and above
expense of raising crops, per acre, will say, that would depend
n the kind of crop that was planted, but if I had my choice of
crops I should say it would easily net me fifty dollars per acre.
As to the ordinary renting share, will say I get half of the
gathered crops and furnish land, team and seed. I furnish
ything and they do the work. I do not board them. As to
t it is where I do not furnish anything, will say I have not had
experience in that; have only rented on shares. As to whether
n only entitled to one third of the crop where I simply lease the
l, the lessee furnishing seed and so on, will say I am entitled
ne half.

hereupon on cross examination, the witness, JOHN E. WHITE,
fied as follows, on examination by Mr. Allen:

ever counted up the number of acres I have cleared for cultiva-
south of the railroad track, but I think about thirty-five acres
he south; have been on the place since 1891; have cleared that
h land, have cultivated that much land, but I have other land
es the land in controversy; have about thirty-five acres under
vation south of the track; part of that thirty-five acres is west
e county road we are talking about. As to how much I shall
to count it up. (Witness considers a long time) I made a
ke in first statement. About forty four acres is the total
nt. I have under cultivation about forty-four acres south of

the railroad track. As to whether east of the county road, will say, No, oh no, not east of the county road. I could tell you that
143 very easy, something like fifteen acres; about fifteen acres under cultivation south of the railroad track and east of the county road; that was part of my original claim there; have cleared it at various times from the time I first went on the land to the present time; have been raising these enormous crops only about three years, that I told about. That fine crop of turnips and cabbages I spoke of was raised west of the county road. I cleared the land; think I cleared it in '95 or '6, along in there somewhere. As to whether it was part of the old Whitcomb ranch, will say, It was part of the land that Whitcomb claimed before the survey. Whitcomb did not claim a portion of the same piece of land. He claimed nothing south of the right of way of the railroad on the land except where he lives, where his house was. I say this land I have cultivated west of the county road was not inside of the Whitcomb field at the time I state.

Stipulation.

At this time it was stipulated by and between respective counsel for the parties hereto that either party may have sixty days from and after the rendition and entry of judgment herein within which to prepare, file and serve bill or bills of exception, affidavits and statement on motion for a new trial herein to be used upon the hearing of motion for a new trial herein and upon appeal to the supreme court of the state of Idaho, in case such appeal shall be had; other party to have thirty days to propose amendments.

144 *Order of Court.*

In accordance with the foregoing stipulation between respective counsel, it is ordered that, either party may have sixty days from and after date of the rendition and entry of judgment herein within which to prepare, file and serve bill or bills of exceptions, affidavits and statement on motion for a new trial herein, to be used upon the hearing of motion for a new trial and upon appeal to the supreme court of the state of Idaho, should such appeal be had; and that the opposite party may have thirty days within which to prepare, file and serve proposed amendments thereto.

The witness then proceeded as follows:

It is inside of what formerly was the Whitcomb field. Mr. Whitcomb had not cleared part of that I am now cultivating.

I had about an acre of cabbages the year I said I had such a good crop, as you say, but excuse me I didn't say, "I had such a good crop." I said last year was the poorest crop and made three hundred ninety dollars off one acre. I had about one acre of cabbage; didn't measure it; had one acre of rutabagas I had reference to; had about an acre and a half of potatoes; three acres and a half in all in cabbage, turnips and potatoes. That is about all on the particular piece

you are talking about. Part of that 44 acres was leased. That 44 acres I don't think is over a hundred yards from the depot at Clark Forks. As to how many acres of turnips ad last year, will say that I think there was four other acres ides this acre I had, but they didn't amount to very much be- se the ground was rough and soddy; gave a great many away; n't get much out of them. It is not a fact that the only thing ot anything out of or made anything on from that farm last r was that acre and a half of potatoes and the acre of cabbages. to what else I did, I sold posts, cut posts and sold them. I ed the posts last year; raised them off the ground and put them he wagon; they were posts that were on the ground. My men led them. What I wanted to tell you was how much crop I ed last year on this 44 acres. The reason I told you that I ed posts was because you asked me if I got my living off that and a half of potatoes; which you now say you did not do and you asked me what other crops I raised on this land besides acre and a half of potatoes, the rutabagas and the cabbage; in to which I will say that's all I raised on that particular piece round. I raised fifteen acres of timothy, that is, on the other of the track, I mean on the south side of the track, east of the ; I think I got about thirty ton of hay from that fifteen acres; k got about thirty loads, generally haul about a ton to the load. o how long that has been in timothy, will say, part of it since '92; cleared an acre at a time since '92 down to '96. Every time I would get an acre cleared I would put it into timothy. Explaining to the court why, if this land is worth so much is so productive, why I have not cleared more and cultivated , I will say, I have been kept from farming my land and have kept poor lawing with these people and have not had the money t a living and clear land.

to whether I ever occupied any portion of this forty acres, the west ¼ of the southwest ¼ of section 2, north of the railroad , will say, I have occupied all of it north of the railroad track t that part actually occupied by the squatters. As to what l on the north side of the track in the way of improvements say, I had one plat of ground which was called by the town- eople two lots; had another lot or two; used the whole of that for grazing purposes; don't understand just how you use the "occupy." As to whether I mean that my cattle ran out some across the railroad track and went on these lots, will say, yes, ent on the other land too. They went wherever they pleased. whether I can say I occupied those lots north of the railroad any more than I did any other land north of the railroad track, ay, there was none of it fenced. Cattle would go where they d, but I always considered they were on my land when they grazing on that land on that side of the railroad track. I considered that as much possession as the other. I had a house I had bought from Mrs. Thibedeau. She was one of the townsite claimants; did not buy the lot from her; bought use from her. There was a small enclosure, occupied one of ts. I had two other alleged lots there which I got from the

government by having the homestead and settling on it. I do not know them as lots. There was a plot of ground laying to my east of Mrs. Thibedeau's ground—You are asking me about my improvements. I told you I occupied all that land except that actually occupied by the squatters. I had the two lots east of Mrs. Thibedeau's fenced; didn't say I fenced them in. Mrs. Thibedeau occupied them before. Her house was on another piece of land. It was not understood when I bought her house that I bought the two lots. She had them two lots leased from me. As to whether or not she was the owner and was foolish enough to get a lease from me, will say, No. I think she was wise. As to other improvements, had a shed on these lots I had leased to Mrs. Thibedeau. I cannot give you the exact date when I first got possession of the Thibedeau house and lots because I don't remember, can tell you approximately; am still in possession of them; have never been disturbed in my possession by some of the squatters. They have never taken possession of the Thibedeau lots. But have disturbed my possession of others when they got possession under lease and refused to give them up; had a long action to get possession of them and had to pay costs on it. I leased to them and had trouble to get
148 them back. The record will show whether any of them were defendants in this case.

As to what particular pieces of land north of this railroad track any of the defendants have occupied, will say, every available piece of ground, every piece they call a lot, every little plot of ground has been fenced and taken possession of by some one of these squatters. I do not undertake to say they are all in possession now since I got my patent.

Thereupon the following question was propounded to the witness:

Q. Have they not been in possession of that land?

The Court: It seems to me that could be admitted in this case, whatever possession they have is possession of certain portions of that forty.

Attorney for plaintiff thereupon stated that, we admit possession or occupancy as alleged in the complaint.

The witness then proceeded as follows: As to how much of this land Gordon Dougherty withheld from me, will say, I don't know what the exact measurement of the land is; couldn't tell you what one of their so called lots would measure on the ground. They usually fenced what they claim. Some of them claim one lot, some two and some five, but I don't know what the dimensions of the lots are; don't know whether they claim separately or not.
149 I do not know sir, that they claim are separated into lots and blocks; fact is I have such a profound contempt for alleged lots that I do not pay any attention to them. I should say Gordon Dougherty has about half an acre fenced on the north side of the track; it is fenced. I could not say upon my oath whether it is separated from lots claimed by his neighbors or not. As to whether I think it is, will say, Well sir, when you ask me that question I don't know whether there is a fence between him and Whitcomb or not; could not tell you whether there is or not. I do not recognize that there are any lots. There are no lots at all.

s to how much land Whitcomb Bros. have there, will say, Well, have an alleged claim to so much of it that I don't know how h. Roy Whitcomb has another and Whitcomb's brother in has another. As to how much Whitcomb Bros. have enclosed e, will say, they have a number of pieces of ground. I do not s—I know that John Whitcomb has his lots around his house ised; do not mean the store. As to how much is enclosed nd Whitcomb Bros.' store in that enclosure, will say, do not whether there is a public passage way through there to the office or not; believe there is. They did have it enclosed. I k they designated it as two lots. I do not know what the size he lots is. As to whether I have tried to find out, will say, I didn't consider there was a lot there. They claimed it as town lots; don't remember the number that it was claimed as; knew they had an alleged plat. As to what Whitcomb had enclosed besides these two lots, they had a place there had a barn on; think they had a piece that had a cellar on, of ground; don't think they were enclosed; don't know what they were on; never recognized any lots and don't know. I that these defendants were claiming one or more lots accord- o the alleged town plat of Clarks Fork. I don't know that one was not claiming the other's part of the lots. I know one was claiming simply one or more lots, according to the d town plat; couldn't tell you whether they were claiming in severalty, or partnership, or how.

lid not clear any of this forty.

ereupon the following question was propounded to the witness: You did not erect any of the buildings you are trying to get sion of did you?

jected to as a matter of defense.

e COURT: I think it can be conceded that that is true.

witness then proceeded as follows:

to the market value of land on the south side of the track, it could be sold for in the market, I do not know. As to er there is any market value for it, will say, you could sell it for some price. As to whether it would be a very small price I would like to take—in fact I would not take a hun- dred dollars an acre for it. I could sell some of it for a ed dollars an acre. I have an idea if I would cut it up into and let each piece have a river front, I might get a hun- ollars an acre for over a hundred acres all right. It does not on the river but it lays back from my other land, which does on the river, some of it, down from that bottom land. This n which I raised so much vegetables does not overflow an- ; does not generally; is very uncertain according to the fall y in the mountains; did not overflow last year. It was very The best crop we ever had was this year; less snow this year is all right in low water.

ereupon the witness was excused.

Thereupon Mr. BROWN was called and being duly sworn as a witness on the part of the plaintiffs, testified as follows on examination by Mr. Stephens:

Know where the forty acres is on one part of which John E. White's house is situated; know where the north and west line is of the forty through which the railroad runs; know the character of the land both south and north of the railroad track, and that west of the county road; have seen vegetables, garden stuff, &c., growing on that ground there. As to what the character of the land
152 north of the railway is as compared to that south of the railway, will say, Well, the land on the north side of the track is more valuable on account of its being above overflow. It is land that a person can rely on each and every year for a crop on account of being above high water and overflow. The south side of the track you can't depend upon every year, on account of high water being more hazardous; therefore I consider the land on the north side more valuable for agricultural purposes than it is on the south side. As to what it costs a farmer to raise hay, oats and garden truck of the kind I say that land will produce, both north and south of the track, will say, I have planted and raised a good deal of hay and vegetables, though not on that particular ground, but have on other ground, and know what it costs to produce that. I have seen the kind of garden stuff raised on this ground, this part of the land that has been occupied.

As to what would be the reasonable value for the use and occupation of that ground per year per acre, will say, I should consider an average value for the use of that land per acre, forty dollars, that is net value.

Have been in and out of Clarks Fork and around there ever since the year 1889; know the market value, what has been the market value of hay, timothy hay, potatoes, garden stuff there while I have been in and out there for these years. Hay has been ranging from ten to twenty dollars a ton; have bought potatoes there; never
153 bought any potatoes for less than a cent and a half a pound, and would have bought more if I could have bought them at that price several times. I consider this first class potatoe ground on the other side of the track there. As to how this forty acres compares with other ground around there for agricultural purposes, will say, I don't consider there is anything any better. As to whether there is a stream towards the east of it that goes down through it, will say, there is a creek, called Mosquito creek, runs south. The river up there runs southwest, a little south of west; runs a little south of west from the railroad bridge I believe.

Thereupon on cross-examination, the witness, BROWN, testifies as follows, on examination by Mr. Allen:

Live at Dufort, Idaho, located sixty-one miles east of Spokane on the main line of the N. P. My occupation is farming, handling timber, contractor for myself. As to where I farm, I have land of my own near Dufort; have 160 acres, nearly thirty acres cleared now; have cleared for cultivation, I think, about fifteen or eighteen acres, never measured it; have not raised a crop off of very much of that

ground; I have it for pasture purposes and have raised some small garden stuff, in all about six acres; have had some small garden stuff planted on it; did not raise very big crops; didn't raise any-
154 thing last year off this land of mine; the year before didn't raise anything to speak of with the exception of ground I had seeded for pasture to wheat and oats, about five acres; seeded it for pasture because I needed the pasture, had no clover or timothy; didn't seed it to timothy and clover because I was not ready to do that; have cultivated land in this country besides that,—Land near the Pend d'Oreille river, belonging to A. H. Garland, on the south side of the river; rented it for the hay. I have three or four acres under cultivation there. This is the first year I have cultivated it. The reason I pay rent for this three or four acres and did not plant it on my own land is because I didn't want to plant it on my own land; have not testified to any rental at all. As to what rent I pay this man for the three acres I am cultivating this year, will say, Well sir, have about two and a half acres of land that I gave him one third of the crop that is raised on that land and I furnish everything. I furnish all the seed; that is not the usual rule. As to whether it is the general rule for the farmer to furnish everything where you rent land, will say, that I have never rented any land before, but this land I give him one third of the two and a half acres for the consideration that I shall plow and furnish the seed, furnish the team, pay all the labor, harvest the crop and put it in the cellar. And I shall clear between one and a half and two acres of new land, and that, I am to have all the crops on that land. I have not
155 done any farming anywhere else in this country. About six acres I have put in cultivation on my own land and this three acres I am cultivating of this other man's land on Pend d'Oreille river is all the farming I have done in this county. On my own land I raised the crop that I planted it for. I seeded it for what I planted it for.

I know this land down at Clarks Fork is worth forty dollars an acre by what I have seen raised on it. As to whether I ever saw any crops raised there, will say, I know I have figured on the ground myself, on this land, and the value of land at Clarks Fork. I know that Mr. White and myself entered into an argument as to what this land was worth and what it would produce compared with my land, as there was lands at Clarks Fork for sale I had thought of selling my place and buying that, as land around Clarks Fork was more productive than mine, so their land was worth more than mine, mine was worth more for something else; so in order to get at it we took a piece of ground that Mr. White had in to potatoes and we counted the rows that was planted, then we counted the hills, the number that was planted in each row; then we took and dug a hill here and there over the piece, and took the potatoes to the house and weighed them, and figured up the amount of hills that was in each row, the length of the rows, the number of rows there was, and the number of pounds of potatoes we had dug out of each hill, and it made them average one hundred and twenty-five sacks to the acre; as we figured them
156 up it would make that average to the acre. Don't remember how many hills of potatoes it took to produce this 125 sacks;

don't remember how many rows; don't remember the length of the rows; don't remember anything but the number of sacks; do remember that exactly. Both of us figured it. We both did the figuring; don't remember how many hills we dug up. Don't know whether we dug up a dozen or half a dozen; know we dug here and there; dug more than five; don't know whether we dug more than ten or not. The reason we made the estimate at the time was to see how much the land would produce there and see whether it would pay me to sell my land. I have timber land. I finally concluded I would not sell my land because before I got ready to buy that land I wanted was sold; that's the reason I didn't buy in that country. That was the first time I estimated the crops in that part of the country. As to whether I lived with Mr. Clark any length of time, will say, I never lived with a man by the name of Clark in my life; since '89 have lived up and down the river; have had lumber camps. As to how long I have lived at Clarks Fork, will say, right in that immediate vicinity within four miles of there, I had a camp there from the spring of '93 in there and worked until about '94, the last of '94 or '95, in the tie business right there; did not raise any crops during those years; have raised crops except those I spoke of but not in this country. I don't know what profit Mr. White made off any of his land from any of his crops only as I have estimated
157 it; never paid any attention to what any other people made off their land there with the exception of seeing their places crops standing, just seeing what their crops was.

In '89 I lived at camp up near Trout Creek, Noxon, —— ——'s Spur and Clarks Fork. As to whether I have been familiar with Clarks Fork since '89, will say, I have been in and out of Clarks Fork since '89; in '89 just passed through there. It was not a town in '89 when I first saw it; don't think there was a depot there.

I have been on those contests in the land office every time I was summoned as a witness for Mr. White; how I happened to come here on this action was because I was summoned; was not subpœnaed here from Newport, Washington; never lived at Newport, Dufort; was subpœnaed by the clerk of the court. As to whether I have always been on hands like warts whenever I was needed in this case, will say I have always been on hand when I was needed in any case whenever I was subpœnaed in any case.

Whereupon COMSTOCK WHITE, was called and being duly sworn as a witness on the part of the plaintiffs, testified as follows:

Am a son of John E. White, reside at Clarks Fork and
158 know the lands in controversy in this action and have ever since 31st day of July 1890; am familiar with the land south of the railroad as well as north of the railroad there; have seen and observed what has been raised on both sides of the railroad by way of garden stuff; know what was raised on that land; know what it costs to raise things on that land; know what the rest of it is worth after paying cost; the use of the land per acre, I should think forty dollars would be a very reasonable value, forty dollars per annum per acre, that is, after paying the cost of production and marketing the

op, I certainly do. As to the character of the land north of the ilroad track with reference to that south of it, whether better or orse, if anything it is better on account of being dryer early in the ring, so can get crop in earlier and get an early crop. On the rth side I have seen timothy, garden truck of all kinds, cabbage d potatoes growing; on the south side west of the road have seen erything on there growing, good garden stuff, potatoes, cabbage, matoes, timothy, etc. When I say net profits I do not mean for e year, but the average; know what timothy hay has been worth nce 1897 in that vicinity. The price has been all the way, ranging om $12.50 to $20.00; average price has been $18.00. As to what would cost to raise, harvest and market timothy hay, will say, ell sir, to raise, harvest and bale timothy hay and put it on the arket costs you about; five dollars a ton would be an outside price; think I might get it for two and a half. That land will average two ton to the acre easy, each year. Garden stuff is worth a great deal more. There is a great deal more ofit out of garden stuff than out of hay; potatoes I consider like-se more profitable than hay.

Thereupon, on cross examination, the witness, COURTON WHITE, stified as follows:

Examination by Mr. ALLEN:

I certainly do think that land is worth forty dollars an acre if t more; have been living on this place with my father since 1890; en helping him a good portion of the time on that land. It costs riously per acre to clear that land, from sixty dollars an acre to enty-five; have got some cleared as cheap as twenty-five. It does t depend upon the amount cleared, the cost of clearing, that is t the question at all. The land will clear itself now from the tim-r products on it. There are various kinds of timber on it, cedar, lite pine, etc. We went there July 31, 1890; been there fifteen ars. As to how much my father and I have cleared in those fif-en years, will say, I have not been there; have been in the employ of e railroad for the last three or four years, but while we were there ere was cleared on the place—There must have been about twenty res cleared when I left the place. That twenty acres has netted my father forty dollars per acre per year easily. It has been in produce principally. Last year he must have had thirty tons of hay. He had more than that. He had twenty some ld head of cattle and five or six head of horses. He might have ld some little hay. I was not at home all the time. He did not ll anything out of hay last year to my knowledge. Raised about e same amount of hay the year before; can't remember whether sold any hay the year before, but I know he sold three hundred d some dollars worth of hay one year; if I remember right it was 1902 or 1903, I forget which. He sold it on the market there; ld to Jeanott; don't remember exact amount. We sold vegetables f this ground prior to last year; been selling vegetables off that er since we have been there. My father sold something like eight

or nine hundred dollars worth last year; sold some myself; made some sales for him in Hope, a good many; think had an acre and a half of potatoes, about. He had part of his crop on shares, think forty acres on shares. He had about four acres I think that he didn't mention that was on the place; had that on shares, rented out on shares to a man by the name of Lamb. As to how many bushels of potatoes he got from Lamb, will say, Lamb paid him in work. As to how much he was to pay per acre, will say, I didn't make settlement with Lamb and don't know, but do know he put in potatoes. As to what contract he made with Lamb, will say, I didn't see the written contract; don't know that it was in writing; know
161 from both Mr. Lamb and Mr. White that he had a contract; know it by their word. They did not tell me the terms of the contract. As to how he was to pay him, will say, I told you I didn't know the terms of the contract; don't know how much my father got for rental of the four acre. As to whether my father leased any more land to anybody else, will say, He had several men working on the place. I don't know the terms of the contracts; know they had about forty acres. As to who they were, There was a man by the name of Reed working there. He had six acres. He was clearing it last year. He had some crop arrangement, don't know exactly what it was; it was on shares. He didn't cultivate the Reed land last year. He cultivated it this year. Mr. Reed is not here as a witness. I think my father has twenty or thirty acres rented out this year; never measured it; has twenty or thirty acres rented on shares; don't know the agreements; have some crop arrangement. As to whether I do not know what he got for his crops, will say, I just stated I know he got eight hundred dollars cash from part of it. That is not the first time he ever made money off that land, at all. He has been making money and a living out of it for ten or twelve years. You bet we make enough out of it to pay the expenses of this lawsuit.

We have cultivated land north of the railroad track; cultivated a piece there; not the Thibodeau place. We had possession of lots
162 from Mrs. Thibodeau. She cultivated it under lease. She took a lease. As to whether my father got her to take a lease from him, will say, She applied for a lease and he gave it to her. She was living there before the lease.

Thereupon the following question was propounded to the witness:

Q. How did she occupy it before she leased it?

Objected to on the ground that it is immaterial, irrelevant and incompetent; trying to get in his defense again.

The COURT: I think you are getting over into your defense.

To which ruling of the court defendants, by counsel, then and there duly excepted and their exception was allowed by the court.

The witness then proceeded as follows:

Quite a lot of this land my father cultivated is situated west of the county road.

Thereupon the witness was excused.

Whereupon, JOHN DEER, was called and, being duly sworn as a
ness on the part of plaintiffs, testified as follows: Reside at Clarks
rk, Idaho, where have resided fourteen years; think I know the
d in controversy in this action; know where the railroad runs
through and cuts the land diagonally in two; know where
the county road is west of Mr. White's house; am familiar
with the products of the ground in that forty south of the
lroad; have seen them growing there; also have seen products
wing north of the railroad track within this tract; would call the
aracter of the land north and south of the railroad the same, one
good as the other; know approximately the cost of producing
se products I saw growing there; know the amount of produce
some places; know what that stuff has sold for in the market
re, what it was worth in the market.

Whereupon, the following question was propounded to the witness:
Q. Taking out the cost, what would that land west of the county
d and on the south side, and that north of the railroad in this
y, produce net, over and above the cost, average, of all kinds of
ps?

Objected to by defendants as incompetent to prove the value of the
and occupation of this land.

The objection was overruled. To which ruling of the court de-
dants, by counsel, then and there duly excepted and their excep-
was allowed by the court.

A. I think that land in there would net, if farmed right, it would
thirty dollars an acre easy enough.

Thereupon the witness proceeded as follows:

I occupied a building on the north of the track there known
as a hotel; went into it on the 11th day of last August; rented
it from some one; paid seventy five dollars a month for the use
he building and fixtures. There were fourteen rooms and beds.
o what proportion of that seventy five dollars per month the build-
was worth, will say, The building ought to be worth fifty dollars
he rate we were paying. As to whether it has been worth about
same amount for that purpose since 1897, will say, I don't know;
e not been there since '97. There was two years I was gone,
and '99.

cross from that hotel is Whitcomb Bros.' store. As to whether
pared to the hotel it was as good or better building or as well built,
say, It is a better building than the hotel. Couldn't say about
ther it is worth as much rent as the hotel.

hereupon on, cross-examination, by Mr. Allen, the witness JOHN
E, testified as follows:

rented that hotel from William Caldwell. I was not in debt to
Caldwell and obliged to leave there because I didn't pay rent.
dwell quit business up there; that is he sold it. When he quit I
't quit. I am not still occupying it; quit there in February.
s to whether that saloon made enough money to pay the license
I had to pay and a dollar a day for the hotel, will say, I don't
remember of saying that it was worth that; said I paid that.
As to what it was really worth by the month at the time I

speak of, will say, Well, at the time I speak of I can't say it was worth very much. If it had been I would never have quit it. It didn't pay as much rent as I paid on it. As to whether I think it could be rented again for such an amount, will say, I think, right at present; might not at some other time; some times rent is worth more some times less, according to the condition of the community.

I went to Clarks Fork July 18th, 1891, lived there for three years, then I went away for a couple of months and then was back there again for a couple of years. It was called Clarks Fork at that time.

Thereupon re-direct examination, by Mr. Stephens, the witness JOHN DEER, testified as follows:

It is worth that amount now because times are better than they were when I was in there.

Thereupon the witness was excused.

Whereupon Mr. GEORGE ROBERTS, was called and, being duly sworn as a witness on the part of the plaintiff, testified as follows on examination by Mr. Stephens:

166 Reside at Harrison, where have resided something over six years; lived at Clark Fork, Idaho, ten or twelve years previous to living here; while living there was familiar with the forty acres of land that is claimed by Mr. White over which the railroad runs, cutting it in two; observed things growing on that forty acre tract, the land west of the county road and on the south and north side of the railroad; saw all kinds of vegetables and I had a garden there myself; had potatoes, everything of that kind; never saw anything like it for raising things on in my life; could raise anything in that flat.

Thereupon the following question was propounded to the witness:

Q. Do you know what it was worth, net, per acre, particularly that land west of the county road on the south side and north of the railroad, in that forty, per year?

Objected to on the ground that it is incompetent to prove the measure of the value for use and occupation.

The objection was overruled. To which ruling of the court defendants, by counsel, then and there duly excepted, and their exception was allowed by the court.

A. Well sir, it was very productive, the soil was, on both sides of the track. I can say I had a little garden, a little place, I don't
167 suppose it was an acre, that used to net me two or three hundred dollars a summer. I ran a hotel there. I raised potatoes, great big ones, and all kinds of vegetables.

The witness then proceeded as follows:

I think the other land is the same character of land. As to whether that was over and above what it cost me to raise the stuff, will say, it would cost me, probably, fifty dollars through the season for my garden.

Thereupon, on cross-examination, the witness, ROBERTS, testified as follows:

(By Mr. ALLEN:)

I disremember dates as to when I first went to Clarks Fork, but was there at the time Spokane was burned; was living there at that time. You say that was in '89. I was living there at that time. As to when I raised this crop, will say, it was several years. It seemed as though the land was getting better all the time; raised a crop the first year; that was the same year Spokane was burned, that summer, and from time to time while cultivating the soil it was getting better all the time. As to how much I had in cultivation there will say, it was 75 feet front and 150 feet back; had that enclosed.

Thereupon the following question was propounded to the witness:

168 Q. Is that the land you afterwards sold to Gordon Dougharty?

Objected to as immaterial and part of their defense.

The objection was sustained. To which ruling of the court defendants, by counsel, then and there duly excepted and their exception was allowed by the court.

Thereupon the witness proceeded as follows:

Giving you a description of this land I had enclosed, where it is, will say, well, it was in Clarks Fork, it was in the town of Clarks Fork, right in this disputed piece of ground. It was 75 feet wide in front, and, probably, 150 feet deep. It was on the north side of the railroad, about 110 feet from the depot. As to whether it was 110 feet from the depot to the beginning of this land, will say, from the beginning of my house. My house was forty feet deep. I was along the right of way all the time. My house was on the right of way. Part of this land I speak of was on the right of way, and part of it was not. I went there in '89. I had lived there about seven years ago, probably a little more. I disremember; am not much of a hand to remember dates. I cleared a good deal of this land I planted in vegetables. It didn't cost much to clear it. That had been pretty well cleared when I went there. The depot was there then.

169 Thereupon the following question was propounded to the witness:

Q. When was the depot built?

Objected to as not proper cross examination, part of their defense.

The objection was sustained. To which ruling of the court defendants, by counsel, then and there duly excepted and their exception was allowed by the court.

Thereupon the witness was excused.

Thereupon plaintiffs offered in evidence a certified copy of the decision of the Secretary of the Interior, dated May 22, 1899, involving the property in controversy.

The same was marked for identification, Plaintiffs' Exhibit "A."

Also certified copy of the decision of the acting Secretary of the Interior, dated May 1st, 1903, on the same property.

Same was marked for identification Plaintiffs' Exhibit "B."

Also offer that portion of the certified copy of the decision of the assistant commissioner, to-wit: The decision of the Coeur d'Alene Land Office, that is of the Special Agent and the Receiver, dated July 25th, 1902.

170 The same was marked for identification, Plaintiffs' Exhibit "C."

Also offered in evidence the original patent from the United States Government to John E. White, dated July 14th, 1903, conveying the N. W. ¼ of the S. W. ¼ and the lots numbered 5, 6 and 7 of Sec. 2, twp. 55 north of range 2 east, east of Boise meridian, containing 128.92 acres; Filed for record in the Recorder's office of Kootenai County, Idaho, July 23, 1903, at 9:25 o'clock a. m. and recorded in book 1 of Patents at page 401.

The same was marked for identification Plaintiffs' Exhibit "D."

At this time court adjourned till tomorrow morning at 10 o'clock.

WEDNESDAY, *July* 12, *A. D.* 1905.

Morning Session.

At this day, present as before, the trial of this cause proce-ded as follows:

The documents heretofore marked for identification as Plaintiff-Exhibits A, B, C and D respectively, the offer of which in evidence appears on page 29 of this transcript, were received in evidence without objection, and the same appear set out in full at the end of this transcript as follows:

Exhibit "A" at page 87 thereof; this exhibit is the same as Exhibit "A" to the answer to cross complaint and appears at pages

171 71 to 93, folios 198 to 263 of this transcript.

Exhibit "B" at page 106 hereof; this exhibit is same as exhibit "B" of answer to cross complaint, and appears at pages 93 to 102, folios 264 to 292, of this transcript.

Exhibit "C" at page 116 hereof; and appears in this transcript at pages 249 to 255, folios 731 to 749.

Exhibit "D" at page 121 hereof; and appears in this transcript at pages 255 to 257, folios 750 to 756.

Thereupon plaintiffs offered in evidence a certified copy of the decision of the Secretary of the Interior rendered on petition for review, dated September 2, 1899.

The same was marked Plaintiffs' Exhibit "E" for identification.

Plaintiffs also offered in evidence a certified copy of the order of the Secretary of the Interior for a second hearing, dated December 20th, 1901 (marked Plaintiffs' Exhibit "F").

Said documents marked for identification Plaintiffs' Exhibits "E" and "F" respectively, were received in evidence without objection and appear set out at the end of this transcript as follows:

Exhibit "E" at page 124 hereof; and appears in this transcript pages 257 to 264, folios, 756 to 777.

172 Exhibit "F" at page 130 hereof and appears in this transcript pages 265 to 269, folios, 778 to 790.

Thereupon plaintiffs rested.

Whereupon the defendants, to prove the issues upon their part, introduced the following:

Case for the Defendants.

Defendants offered in evidence the testimony taken in the first and second hearings of the case in the land office:

"Mr. STEPHENS: We object to that evidence being introduced, for the following reasons:

"1. Because there is no allegation in the pleadings authorizing the introduction of that evidence.

"2. Because it would be retrial if your Honor should examine that evidence and the facts before the Land Department, over which your Honor has no jurisdiction, and which you are not required to do.

"3. There is no allegation as to what the evidence was in the Land Department, and therefore, it is inadmissible without an allegation as to what the facts presented were, and what the facts were, found by the Land Department.

"4. It is an attack upon the findings of fact made by the Secretary of the Interior as shown by the decision already in evidence; this decision shows that there were controverted facts before the
173 Land Department; these facts have been passed upon by the Department and are final.

"5. That the allegations of the complaint show nothing with reference to the decision of the Department of the Interior to authorize the court to review it; the only allegation being a mistake of law by the Register and Receiver which could have been corrected by appeal. There is no allegation that the Secretary of the Interior or Commissioner of the General Land Office refuse to consider what they claim was errors of law on the part of the local land officers, and in the absence of an appeal it is waived, and must be corrected, if at all, by appeal to the General Land Office, and thence to the Secretary of the Interior; that all questions of fact or questions of mixed fact and law in the Land Department are final and conclusive.

"6. It is immaterial, irrelevant and incompetent for any purpose.

"Thereupon respective counsel argued the questions raised at great length.

"The COURT: Your contention, Mr. Stephens, is that the court is bound by these findings of fact?

"Mr. STEPHENS: Absolutely.

"The COURT: And cannot go behind them?

"Mr. STEPHENS: Yes, sir.

"The COURT: What have you to say about that?

174 "Mr. ALLEN: Our position is that we are not bound by their findings but are bound by the facts. I ask your Honor take these conclusions and see whether they are founded upon the facts or not. We say there is an erroneous conclusion of law as applied to these undisputed facts.

"The COURT: Well, I will reserve my ruling upon the objection until the entire case is in and will dispose of it in that way, unless you desire to have it passed upon now.

"Mr. STEPHENS: I would like to have your Honor pass upon it one way or the other, for it seems to me it is cumbering the record for no purpose.

"The COURT: No, I am not satisfied at this time to rule that this evidence should not go in, and am not satisfied to rule that it should. If this court is bound by these findings, there is a very easy way to reach a conclusion in this case. As Mr. Stephens is not satisfied to have the court reserve its decision upon this matter, I will overrule the objection and let the evidence go in.

"To which ruling of the court plaintiffs by counsel then and there duly excepted, and their exception was allowed by the court.

"The COURT: I may reverse this ruling, however, later in the case.

"All evidence hereinafter shown as offered or introduced on behalf of defendants, relating to the subject matter of the contest or
175 proceeding, or any proceeding in the Land Department was objected to by the plaintiffs, upon the same grounds and for the same reasons and upon objections being overruled plaintiffs duly excepted, which exceptions were allowed by the court."

The same were marked Defendants' Exhibit No. 1 and Defendants' Exhibit No. 2, respectively.

Said documents were received in evidence, over the objection of plaintiffs after extended argument by respective counsel, and appear set out in full at the end of this transcript, said Defendants Exhibit No. 1 appearing at pages 302 to 475 inclusive, and Defendants' Exhibit No. 2 appearing at pages 476 to 881 inclusive.

Counsel for plaintiffs stated that the purpose of offering said documents was to show that, at the time Mr. White filed upon that land it was occupied as a town site, the portion shown in the plat attached to the cross complaint; and to enable the court to determine from an investigation of the undisputed facts whether the conclusions of law are justified by the facts; not for the purpose of having the court review the findings of fact.

Thereupon defendants offered in evidence a certified copy of contestants' map marked "Contestants' Exhibit "A," which was used in the hearing in the Land Office, "Received in evidence Feb'y. 24, 1896, James Graham, Register."

176 The same was marked Defendants Exhibit No. 3; and was received in evidence and appears set out at page 939 of this transcript.

Defendants also offered in evidence certified copy of map marked Contestants' Exhibit "D," as used in the hearing in the Land Office."

The same was marked Defendants' Exhibit No. 4, (and appears set out at page 940 of this transcript); received in evidence; transcript pages ——.

Defendants also offered in evidence "Plat showing base of hill in the E. ½ of N. E. ¼ of S. W. ¼ and lot 6, Sec. 2, Twp. 55 N. R. 2, East B. M., Idaho, used at the hearing in the Land Office.

same was marked Defendants' Exhibit No. 5; received in evi-
and appears set out at page 941 of this transcript.
endants thereupon offered in evidence map marked "Con-
' Exhibit 'A,'" used on the hearing in the Land Office.
same was marked Defendants Exhibit No. 6; received in evi-
and appears set out at page 942 hereof.
l maps, marked Defendants' Exhibits Nos. 8, 4, 5 and 6 re-
rely are certified to by the Acting Commissioner of the general
ffice as being true copies of said original exhibits.

"To the offer or introduction of said defendants' exhibits
Nos. 3, 4, 5 and 6 and each of them plaintiffs by counsel ob-
jected upon the same grounds and for the same reasons urged
t the introduction of defendants' exhibits Nos. 1 and 2 herein-
stated, that the court cannot pass upon testimony heretofore
in the land office contest cases, and admitted over the ob-
s of plaintiffs in this action, and for the further reason that
ord shows that the land was surveyed in the fall of 1893 and
g was done by any of the alleged townsite claimants until after
ff John E. White had made this application for entry, and
lure of the alleged townsite claimants to make application be-
pplication was made by plaintiff John E. White waived the
f townsite claim; and for the further reason that nothing can
e subsequent to the date of settlement upon the land in con-
y, which was found by the land department to be in 1891;
r the further reason that this court has no jurisdiction or
to investigate questions of fact in the absence of necessary
ions and there being no such allegations made in this case.
re, there is no issue in this case as to what the facts are, the
ound by the department upon the issuance of patent being
sive of what the facts are; and they are incompetent, irrelevant
material for any purpose; and for the further reason that it
shown that the alleged town-site claimants complied with the
l Statute either by filing in the recorder's office or the land
office.

"Said objections were by the court overruled, to which
ruling of the court plaintiffs by counsel excepted, and their
on was allowed by the court."

endants were thereupon given permission by the court to offer
dence on its arrival from the surveyor general's office, a certi-
py of the official plat of that township, with the object of show-
t Clarks Forks is marked on there officially as being a town;
g stipulated by and between counsel with the consent of the
that the case shall be left open for the purpose of such offer
he map arrives; counsel for plaintiff to have privilege of ex-
g same and making such objections as may seem proper.

reupon Defendants offered in evidence a certified copy of the
ory right of John E. White, dated November 17, 1890, filed
ord November 18, 1890, at 10:5 o'clock a. m. and recorded in
A of Poss. claims on page 139, records of Kootenai County,

the introduction of said certified copy of claim of possessory

right plaintiffs by counsel objected upon the same grounds and for the same reasons urged as objections to the introduction of defendants' exhibits Nos. 1 and 2 and Nos. 3, 4, 5 and 6, or either of them, and for the further reason that it is already in evidence, a copy of it appearing on page 140 of Defendants Exhibit No. 1, that
179 this is simply repetition, that it has been passed upon already by the department.

Said objection was by the court overruled, and plaintiffs duly excepted, which exception was allowed by the court."

The same was marked Defendants' Exhibit No. 7; received in evidence, and appears set out at page 881 hereof.

Whereupon JOHN WHITCOMB, was called and being duly sworn as witness on the part of the defendants, testified as follows, on examination by Mr. Allen:

Reside at Clarks Fork, Idaho; came to Clarks Fork in 1890, July third; know Mr. White, the plaintiff in this case.

Q. Did you know his claim that he made on the public land near Clarks Fork at the time you went there?

"Plaintiffs by counsel object to this upon the same grounds and for the same reasons urged against the introduction of Defendants' Exhibits No. 1, 2, 3, 4, 5, and 6 or either of them, and for the reason that there is no showing that any evidence the defendants now offer or desire to produce was not produced in the land department, and this evidence having been offered in the Land Department
180 and decision having been rendered thereon, defendants cannot now put in other evidence.

"Said objection was overruled, to which ruling of the court the plaintiffs duly excepted, and their exception was allowed.

"All of the evidence of said witness John Whitcomb relating to any and every matter other than concerning the value of the use and occupation of the land in controversy was objected to by plaintiffs upon the grounds and for the reasons above stated, and said objections were at the time overruled, and exceptions duly taken by plaintiffs and allowed by the court."

Knew his claim that he made on the public land near Clarks Fork at the time I went there. It was situated on the south side of the Northern Pacific railroad track, and was on what was known as the McQuaid ranch at that time; later on it was on the road running south and down the railroad. The northeast corner of the ranch as he claimed it at that time was something very close to 200 yards from the depot of the Northern Pacific railroad at Clarks Fork; and the county road as it was laid out from the railroad to the river was Mr. White's west line at that time; the Northern Pacific Railway was his north line.

I have lived there ever since. Mr. White first made claim that he claimed that portion of the N. W. ¼ of the S. W. ¼
181 of Sec. 2, the land in controversy, north of the railroad, in the fall of 1895, at the time he filed on it in the land office. I did not know of his making any claim to any portion of that land

north of the railroad prior to the time he filed on it in the land

to whether Mr. White at any time enclosed his land with a
will say, there was a fence between Mr. White's ranch and
other's, M. P. Whitcomb's place on the west. He did not put
fence or attempt to put any fence along the line of the rail-
I believe.
eard the testimony of Mr. White and some others as to the
of this land in this townsite for agricultural purposes, gar-
, etc., yesterday. Stating to the court what I know about
ue of that land north of the railroad for garden purposes or
her purpose, the value of the use of it, will say, I am satisfied
ill state from my own personal knowledge that the ground on
rth side of the track is absolutely worthless, for anything in
y of agriculture, until it is brought up by fertilizing. A
portion of it is nothing much but sand and rocks. I heard
stimony of Mr. White as to his yield of potatoes and cab-
e had off an acre or so, two or three acres there. I know
round, and know the conditions under which he raised that
e spoke of. The reason of his getting the crop that he got
was that this produce was planted close—or right immedi-
ately around his barn where it was used as a barnyard, and
on account of the fertilizer from his barn, his cattle run-
n there all winter and in the spring, by planting it in ground
at he got his crop. The balance of the land of this townsite
in con-roversy on the north side of the track would not pro-
s much as the ground he testified about, this acre or two he
at crop from. The reason is the condition of the soil, on
t of the difference, on account of the condition of the soil;
y it was most of it sand and gravel. There was a party by
me of Haberman plowed up two lots and planted them to
s. I saw his crop. The condition was just as any one would
that land without fertilizing it. He put no fertilizer on
t all and had no crop at all. It would not produce without
zers, something to build up the land.
ng what this land, including this townsite, would be worth
purpose of gardening and raising crops, the portion of it
the limits of this townsite as surveyed, per acre per year in
dition as it has been, will say, it would be comparatively
ss.
the surviving part[illegible] of M. P. Whitcomb & Co., of the
f I remember right t[illegible] firm of Whitcomb Bros. owned two
this townsite. Stating what would be the value of the use
and occupation of lots 1 and 2, block 7; 8, 10, 12, 13,
block 5; lots 7, 8 and 9, block 8, which you say the answer
alleges John B. Whitcomb, surviving partner of Moses P.
mb and John B. Whitcomb, co-partners, doing business un-
firm name of Whitcomb Bros., owned, for agricultural pur-
anything else, will say, I should think they were not worth
y little in their present condition, in the condition they
ound in.
ow the lots situated on the south side of the railroad claimed

by Mrs. Whitcomb, wife of Moses P. Whitcomb, described in the answer. As to the value of these lots for agricultural purposes, or garden purposes, or any other purpose in their condition as they have been, I will state that they were of very little value for agriculture until, as I say about the others, they were fertilized. When he settled in there in the first place he plowed up and planted and got very little or nothing, no potatoes at all. After he fertilized it, as I say, any of this ground after it has been brought up by fertilizing will produce, that produced well, but in its natural state it is almost barren.

Thereupon, on cross examination by Mr. Stephens, the witness, JOHN WHITCOMB, testified as follows:

Mr. White has not made any change in his barn or barnyard in the last year or two. This produce was not planted be-
184 tween the barnyard and the river. His potatoes and cabbage and all that stuff was planted close to his barn. As to whether he had a barnyard there of three acres, will say, yes, ten or twelve acres in the lot. It was all so his cattle could run from his barn off over his claim in there; don't know how many cattle he had running there. He had fifteen or twenty head I guess; running over his whole place. They could run over all the land immediately surrounding his barn, as I say. His cattle in the winter time would stay in there. They wouldn't run out in two, or three, or four feet of snow and wouldn't run over the land as they did in the summer. I think the barnyard had stock in it which had manured it two to four inches deep and he turned that under; did not say ten or fifteen acres of it. There was probably three acres of that barnyard was manured and turned under. I remember the time you were up there in August, 1904; remember the time you came up there. As to whether the barnyard is just the same now as then, he has taken out some of the stumps and cleared it out. That under cultivation was not between the barnyard and the river, it is round the barn. He did not have the barnyard fenced. As to whether the stock ran right in the potatoes and everything else, will say, he didn't use it for cattle or anything that way in the summer, but as I say, he used it for his cattle to run on in the winter when he was feeding, he fed his cattle in there. But in the summer time he planted it and r-ised his vegetables;
185 that's where he raised his crop.

Can't say whether he has twenty-one acres under cultivation; can't tell you whether he has in the neighborhood of that, nor what he had planted there this summer. I have been past there on the road, but couldn't say what he had planted there. Last year I paid attention; saw his crops growing in there. He had cabbage in there. He had turnips in there.

Mr. White's land is not practically all the same. All the land is not rich bottom land. As you go from Mr. White's place toward the river it is a better class of land, better class of soil, more clay in it, less sand, more soil; great deal more sand on the north side than the south side of the railroad; there is a little less on the south side.

As to whether there are first class crops being raised off north of this tract of land being run there by Mr. Judge and some others, will say, they have pretty fair crops; can't say they were good crops. Mr. Judge raised a crop of potatoes there two or three years ago four or five inches high, potatoes none of them formed though. As to whether new land yields well, it don't make any difference with that land whether it is the first, second or third year unless it is fertilized. I say that land is comparatively worthless without fertilizing. It is not true that as far as Mr. Judge is concerned there has been no trouble in raising potatoes on the north side of the track without fertilizing; heard what they said about it here; they are not telling the truth, without fertilizing. You say the
186 secretary of the treasury found he was claiming there in 1891; I don't know whether he found so or not. I knew just as well as now what I have testified to here when the contest was in the land office; did not appear there as a witness; knew the question of when White claimed was involved in that contest.

Thereupon the following question was propounded to the witness:

Q. And all the people that were undertaking to claim this alleged townsite were banded together all in one body to make the fight together?

Objected to as incompetent, irrelevant and immaterial.

The objection was overruled. To which ruling of the court defendant, by counsel, then and there duly excepted and their exception was allowed by the court.

A. They were all fighting for what they considered their rights.

Thereupon the witness proceeded as follows:

They are all fighting together for the whole thing, what they claim to be the townsite. They surely was fighting to keep Mr. White out of it too. I do not know whether there is any evidence in the land office to the effect that Mr. White claimed that land in 1893, nothing more than what I have heard read here today; don't think I ever understood at that time that there was
187 testimony before the land office to that effect. I never heard of it before; don't think Mr. White ever claimed this land until '95. I think I have seen the finding of the secretary of the interior. As to whether I know he found that he claimed it in 1893, will say, no sir, I couldn't swear that he did; don't remember. As to whether Mr. White talked to me in 1893 about the land at all, he talked to me very little. As to whether I did not know what he was claiming in 1893, will say, as possessory right. As to whether he talked to me about it in 1893 and tell me what he claimed, will say, Mr. White and I have had very little talk about the land there. So I do not know from personal conversation what he was claiming in 1893; that is also true of 1894, and of 1895 up to the time he made his filing; so from, as far as I know from any personal conversation or declarations I heard Mr. White make, don't know, did not know in 1893, 4 or 5 up to the time he made his filing, just what he was claiming.

There are berries raised there now every year on this disputed tract on the north side of the river. Mr. Nagle has some there north

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of the townsite on his land; none on what I call the townsite only what Mr. White has; Haberman never raised any to my knowledge; as to whether Mrs. Thibedeau raised any when she was there, can not say that she did; don't remember that she did; don't
188 remember of Mrs. Thibedeau having a cabbage patch right along side of the postoffice; don't remember that at all. Foreman had some potatoes over there; they were fairly good; Roberts also raised stuff there; had some garden stuff, lettuce; raised it for his hotel; couldn't swear he raised more than enough to supply his hotel; can't swear he did not. Mr. Robert's place is a place I never frequented at all; don't know as I was ever in there half a dozen times in my life.

This land for agricultural purposes is not worth practically anything without fertilizing. It will grow grass, grass hay will grow on it; as to whether good timothy, nothing very flourishing it wouldn't be unless fertilized to bring it up. As to whether I pastured two or three cows on only one of these lots will say, she would be pretty thin in the fall if I did. I did not do it. It was not me or my brother that did that right there on one lot. Right there where my cow is now as to whether I know where that is, will say, no, there are four or five lots enclosed there. You say you thought I said we had only two, will say, they are not Whitcomb Bros.' lots at all. It is fenced in by Willett. Never used it for telegraph and telephone poles at different time not but very little. Our poles were most all piled on the right of way or public highway.

I don't know what that land is worth that our store is on; do not think it is easily worth twenty-five dollars a month. I say
189 I can't tell anything about what it would be worth. There being a building there, whether the land and building are worth seventy-five dollars a month. I don't know; don't know what it would be worth for the purpose it was occupied. I did not raise any vegetables where the store is.

I occupied other ground beside that where the store is, four or five lots about twenty-five or thirty yards from the store on the north side of the railroad; used it for a pasture for some cows; only had one cow and I pastured her part of the time on other lots, and part of the time picketed her in our yard; the yard is part of these lots; have done nothing else with it myself; have raised a few vegetables as I say, not enough for my own use. It is not a fact that John Loyd has used what I call that lot, what I call my lot over there and it has been sufficient for the purpose of gardening all he wanted, everything he wanted, not to my knowledge. John Loyd is not a relative of mine, either by marriage or anything at all. He is a relative of some of the Whitcomb family. He is a relative of my brother's wife. As to whether on that land above it there is a stream coming down called Mosquito creek comes round through White's land also through what I call the townsite will say, no sir. As to whether it misses the townsite will say, I don't know but right on the extreme southeast corner it might touch it. It is only a kind

of a slough or creek it is; don't think it touches it. The
190 character of that creek is such that the water under ground percolates all through the ground, close to the surface all the time, some times too close. That might be one thing that undoubtedly would help to make it valuable for raising crops if it didn't get too deep, this water percolating through the soil as you say.

At the time the patent was issued my brother and I did not get ready to remove these improvements off that land. As to whether we were preparing to remove them, will say, we had made some little preparations; don't think in my own suit I admitted I was going to remove them. We were getting ready to remove them. As to whether I am one of them up there that have declared that if I lost out those buildings would go up in smoke, will say, I never made such an allegation; never said so to my knowledge; don't think I have that determination in my mind. That is not a matter of common talk up there that we are going to do that.

Thereupon, on re-direct examination by Mr. Allen, the witness, JOHN WHITCOMB, testified as follows:

These different town lots claimed by the defendants in their answer are not occupied jointly but each one occupies them separately.

As to the lots there occupied by myself as the surviving
191 partner of Whitcomb Bros., lots 1 and 2, block 10; lots 6, 7, 8, 9, 10 and 13, block 5; lots 7, 8 and 9 block 8, nobody else has occupied them lots besides ourselves; no one has ever occupied them besides ourselves and our grantors.

The lots occupied by Mrs. Whitcomb, wife of Moses P. Whitcomb, myself and Le Roy Whitcomb, Lot, block 10 and all of blocks 11, 12, 13, 14, 15 and 16 in that town; no one occupies them but Mrs. Whitcomb.

The property of John Reed, lots 7, 8, 9 and 10, block 12, and 13 and 14, block 2; John Reed occupies those lots; don't know as I could tell you what time he started in occupying them. He bought of Foreman as I understand it, but as to the date of that I paid no attention; couldn't say just how long he has had it.

Lots 5 and 6 block 9, claimed by Caldwell and wife; that is right over next to Reed's; they are not occupied at the present time.

I know where William Johnson and his wife live. As to the lots they live on, I will examine this map you show me; It is in block 4, three lots, 18, 19 and 20 in block 4; nobody occupies those lots besides Mr. Johnson and his wife.

As to whether Mr. Hasselroth and wife have one, two or three lots or whether they have just two lots—You say they are lots 9 and 10, block 4; will say he occupies lots 1 and 2 in block 4 and 9 and 10 in block 4.

192 Think the lots occupied by George Piatt and wife are 4, 5, 6, 7 and 8 in block 4; nobody else has occupied those lots besides Mr. Piatt and his wife.

The description of the lots occupied by Andrew Paulson and his

wife are lots 6, 7, 8, 9, 10 and 11 in block 2; nobody else has occupied those lots except Mr. Paulson and his wife.

John Kirk is lots 8, 9, 10, 11 and 12 in block 3; nobody else has occupied any portion of these lots except Mr. Kirk.

Now about defendant, Brocklin Dougherty and Nora, his wife, he has lot 11 in block 5; these lots are all in Clarks Fork that I am talking about.

Defendant Luke Cotter and Sadie Cotter his wife have lot 12 in the same block 5.

Defendant Walter Flemming and Rose Flemming his wife occupy lots 1 and 15 in the same block 5; nobody else has occupied those lots or any part of them but Flemming and his wife.

Defendant Schindler occupies lots 2, 3, 4, 5 and 6 in block 5; nobody else occupies these lots with him.

Jason Edwards and Julia Edwards his wife are in possession of lots 1, 2, and 3 in block 9; not sure whether he had three lots or just two, one and two; know he has two in there; nobody else occupies them with him.

Gordon Dougherty and his wife had a portion of lots 3,
193 4, 5, 6, 7, 8 in block 10 in that town; they were most of them fractional being in the corner of —. He had what there is of them.

Defendant Mrs. Emma Loyd had lots 5 and 6 in block 8, and she had lot 4 too, lots 4, 5 and 6 in block 8.

I, John P. Whitcomb am in possession of lots 11, 12, 13, 14 and 15 in block 4.

Frank Allen, I think he claimed lots 1, 2, 3, 4, 5 and 6 in block 3, and 3, 4, 5, 6 and 7, fractional in there, in block 1.

Defendant P. B. McWilliams had 16 and 17 in block 5.

Each one of these parties claimed separately from the others.

Thereupon, on re-cross examination, by Mr. Stephens, the witness, JOHN WHITCOMB, testified as follows:

I think all these persons were there in '95; quite a number of them did not come in afterwards to my knowledge; couldn't say whether Frank Allen was there in '95 or not; couldn't say whether Caldwell was there at that time or not; don't remember just when Caldwell came there. As to whether I know that Caldwell came
194 there and got out poles long after '95, will say, I couldn't say to the date; it is something I didn't tax my mind with; couldn't say whether it was about the year 1900 when he came there; couldn't say when he came there. As to whether the fact that I bought timber of him will help me fix the date, will say, I don't think I ever bought any timber of Caldwell till this year.

Can't say whether Kirk was there in '95, but don't believe he was; couldn't say he was not; Cotter is occupying his house in there; can't say if Cotter was there in '95, but don't hardly think he was. I have no record of those people; kept no record of when they came there. I think I simply mean that they are occupying them now and have been, or somebody from whom they claim ever since the

year 1897, they or some one who was claiming have been there since '97, when final proof was made by Mr. White. As to whether not all of them were there at that time but some have come in since, will say, Well, as I said, I couldn't swear to them because it is something that I kept no record on them. Couldn't say whether Gordon Dougherty got on there after '97.

These people I have mentioned have from one to five lots, and use them for gardening, for pasturing cows and crops and things of that kind where they live some just use them to have their house on some of them haven't got any house on them. I think Allen has not. He has a small kind of a shed; couldn't tell you when it was built.

195 Thereupon, on re-direct examination, by Mr. Allen, the witness, JOHN WHITCOMB, testified as follows:

I said these men or their grantors from whom they purchased have occupied them since '97. They or somebody under whom they claim have been there much longer than that. These lots have been occupied by these people that are now thereon them or persons from whom they bought, since '95 when it was surveyed.

Thereupon the following question was propounded to the witness:

Q. Were any others that have bought there occupying these lots prior to the filing of the plat in '95?

Objected to as wholly irrelevant and incompetent for any purpose; having been passed upon and facts found by the Land Department; no allegation in the pleadings that evidence upon that subject was not received by the land department.

The objection was sustained. To which ruling of the court, defendants, by counsel, then and there duly excepts, and their exception is allowed by the court.

The witness then proceeded as follows:

Know where the house that Mr. Roberts occupied was with reference to the right of way of the railroad. He had his residence
196 right west of our store, that is our present location of our store.

The following question was then propounded to the witness:

Q. Was it on the right of way of the railroad or off from it?

Objected to on the ground that there is no controversy here upon that point; Land Department passed upon it; no allegation here as to the location of Roberts' house, and it is not in issue in this case at all.

The objection was sustained. To which ruling of the court defendants, by counsel, then and there duly excepted and their exception was allowed by the court.

Thereupon the witness was excused.

At this time court adjourned till tomorrow morning at 9:30.

THURSDAY, *July* 13, *A. D.* 1905.

Morning Session.

At this day, present as before, the trial of this cause proceeded as follows:

ROY WHITCOMB, was called and, being duly sworn as a witness on the part of the defendants, testified as follows on examination by Mr. Allen:

197 Reside at Clarks Fork, where have resided since July 3, '90; am acquainted with Mr. White, plaintiff in this suit; have been acquainted with him since July 3, '90 when I met Mr. White; am acquainted with his residence, his house.

"Q. You may state if you know, the boundaries of Mr. White's ranch as he claimed it when he first claimed it.

"Plaintiffs objected to this upon the same grounds and for the same reasons urged as objections to the introduction of defendants' Exhibits Nos. 1, 2, 3, 4, 5 and 6 and the objections specified in preceding paragraphs hereof, which objection was overruled, to which ruling of the court plaintiffs excepted, which exception was allowed by the court.

"All of the evidence of said witness Roy Whitcomb relating to any and every matter other than concerning the value of the use and occupation of the land in controversy was objected to by plaintiffs upon the grounds and for the reasons above stated, and said objections were at the time overruled, and exceptions duly taken by plaintiffs and allowed by the court."

The boundaries of Mr. White's ranch as White first claimed it when he took up the place was east, or south of the railroad track and west of father's place, M. P. Whitcomb's place, commonly known at that time as the McQuaid place. The northeast corner of White's ranch, with reference to the Northern Pacific depot at Clarks

198 Fork, was somewheres about 200 yards, something about that, down the track, east of the depot, and then off to the south of the track; on the south side of the track, about 200 yards east of the depot, something like that.

As regards fence between M. P. Whitcomb's ranch and White's ranch being constructed at any time just the exact time of the fence being placed there I couldn't say, but there was a fence between White's place and the Whitcomb place. The fence was there before White built his house. The north line of White's ranch, as he claimed it at that time, was south of the railroad track, parallel with the railroad track, running east, and south of the track.

The first I ever knew that Mr. White was claiming land on the north side of the railroad track was just before White made his filing which you say was November 27th, 1895; it was just before that filing.

As to when the houses that were on the right of way, that had been on the right of way of the Northern Pacific railroad, were moved back to the north off the right of way, will say the store was moved back in '95, along in the summer; the buildings on the right of way

were moved back in '94 and '95, before White began to claim his land on the north side.

Thereupon the following question was propounded to the witness:

Q. What buildings were outide of the right of way at all times and on this disputed ground?

199 Objected to for the reason that it has all been gone over by the department. The Department has found that all these buildings were on the right of way except that dwelling at the time White made his residence there; Secretary of the Interior so decided.

Defendants' counsel stated that the object of the testimony was to show what residences were off the right of way on this part of the ground north of the railroad prior to the time of the filing, as White had not claimed this land at all until the time of filing.

The COURT: I do not think it is necessary to take up the time. I think it is shown by the record. If the court is going into these facts at all it should be bound by this record. It is a very serious question whether I have the right to. I want you gentlemen to understand that.

To which ruling of the court defendants, by counsel, then and there duly excepted and the exception as allowed by the court.

Thereupon the witness proceeded as follows:

Heard the testimony of Mr. Brown and Mr. White and Mr. Roberts as to the value of this land for agricultural purposes yesterday. Stating what kind of land it is for agricultural purposes, both north and south of the track as well as that part of the townsite that is south of the track and west of the county road, describing each separately the north as well as the south, will say. The ground that is
200 north of the track is quite a little higher, and is not very much good until it is fertilized and brought out in cultivation. And the land on the south side of the track is a great deal the same in regard to what I know about it. There are some portions of this land south of the track, down in where White has cultivated, is cultivating now, where there is subirrigation, irrigation from underneath, is some better than that north.

That is where he raised his potatoes and cabbage, that is, where he raised such large crops of potatoes and cabbage was in round the barn.

Take the land in this forty north of the railroad, in its natural condition, as to what it would be worth per acre, fair rental of it per acre, as to what a man could afford to pay for it in order to be able to farm it, will say, He couldn't pay much for it. In regard to taking it just as it is, prepare it for cultivation and all, what would be a fair rental per acre per year, what a man could afford to pay for the use of it, I am not much of a farmer, I couldn't say as to that. I know he couldn't pay any great amount for it because he couldn't realize any great amount off from it, therefore he couldn't pay any great amount for it. Very small crops have been grown upon it without its being fertilized. What I mean by small crops is that potatoes would be small and not very many in a hill; would not amount to anything hardly, to speak of. If a man took it as it is

and undertook to cultivate it and raise a crop on it he couldn't
201 afford to pay anything on it in the shape it is in. The condition of this land where these two or three acres was of his own land that Mr. White testified about where he raised such a large crop, was most favorable. He had had quite a lot of fertilizers on it, and it was on land near the barn where cattle had been running all winter. Of course there was a great deal of fertilizer and the land would be in a whole lot better shape there than without fertilizers. As to whether the condition of that balance of the land west of that land on the north side of the track in this ground in dispute is the same, whether the same conditions exist, will say, well, west of White's place is the only ground that is on this land in dispute; west of that place have raised crop there two or three different times myself, and potatoes that I had in last year didn't amount to hardly anything; in fact some of them I didn't dig at all; turned the hogs into them that was not fit to dig. And garden truck, my wife watered it; took a small garden patch and evenings she would take and water the garden and kept it in pretty fair shape. I did not get any more off this land I cultivated there than it cost to raise the crop, no more in value.

The COURT: Let him state what he did and let the court determine whether he had any results over the cost from the crop he raised.

Thereupon the witness proceeded as follows:

The following question was asked the witness:

202 Q. State whether or not it was possible to raise any more off from that land than it will cost to raise it?

Objected to on the ground that it is calling for a conclusion of the witness.

The objection was sustained. To which ruling of the court defendants, by counsel, then and there duly excepted and their exception was allowed by the court.

Thereupon on cross examination by Mr. Stephens, the witness, LEROY WHITCOMB, testified as follows:

As to whether I stated that the place of Mr. White was west of the Whitcomb place, will say, not west, east. As to which it is, will say, why it is east. If I said it was west a while ago, it was simply an error, that was all.

This patch of produce that Mr. White raised last year was right south and east both of the house where I am living, that is, his garden was right over the fence from my yard. I certainly lived there last summer; was there off and on; nothing to prevent my seeing where the patch of potatoes was, not if I would notice them any. The portion I am talking about is east and southeast of where my house is. I have a fence on the south side of my yard; not a "kind of a fence;" there's a picket fence there. There is no fence that I know of round his barnyard. He does not simply let
203 his stock run in on his garden when it is in crop. The stock runs there all winter and all spring, from the time he takes

the crop off until crops are put back in the spring; whether they run all over the forty acre field, will say, he has more than a forty acre field, that is there is more than a forty acre field for them to run in, but in the winter time the cattle confine themselves right around the barn. They go for water, I suppose, back and forth, but stock generally hovers round the barn; can't say exactly the number of cattle that have been running there, but there is quite a few, horses, cattle, such as that, pigs, hanging round the barn. I wouldn't say that is all the manure that has been on this, just the stock running there, where this cabbage and potatoes were raised, because there was a whole lot of manure throwed out nights when they kept their stock up; do not know where that was taken; can't tell you whether Mr. White has some potatoes there this year; have not seen them. Mr. White has several men in different patches in there as I understand it; do not think it is cultivated right up to the right of way west of where I live. It is not a fact that except where I am living up to the right of way it is cultivated from there to the river, unless you call bushes cultivation. As to how near the river it is cultivated, I should judge about 100 yards behind my house, never paid much attention to what White has cleared up there, should judge about a hundred yards back of my house, for that distance it is cultivated; then there is a patch of land in there laying fallow right
204 along this line. There is some men have a patch in west somewhere down there; one of them is Montgomery, have a patch in there; there is a patch up in towards Mosquito creek bottom; and this piece that White claims he raised such a big crop on last year, didn't pay any attention to his potatoes this year at all, not if he had them. Schindler was just planting his crops a few days ago.

Nagle did not raise anything up on the north side of the track and Catloe has nothing there except hay. It is not the finest timothy I ever saw; didn't say it was no good. His timothy is just fair.

I said this land down there on the river sub-irrigates. What I call wash, north of the track does not sub-irrigate, for this reason, that the land north of the track is big heavy boulders and gravel and stuff like that that comes near the surface, and the water which should sub-irrigate it would be way down deep and of course you don't get the good of sub-irrigation that you would on lower ground.

You do not get crops in earlier in the spring, no sir you do not, on that kind of land; do not get crops in any earlier than down across the railroad; don't know whether Catloe gets his crops in two weeks before anybody else; do not know that. I did not say these lands that do not subirrigate can not be farmed any earlier in the spring than on the other side of the track. I said I did not know.

As to whether I said a few moments ago that they could not
205 be put in any earlier, will say, I said I didn't think you could; never paid any great amount of attention to their crops; have not farmed myself, not to any great extent, am in the grocery business; was working for the railroad company; put in little crops on my own land. My land is on the south side of the track. I couldn't grow any potatoes there at all; didn't say the land

where my patch is is no good, suppose it is as good as the other. There is not any of it as good as this that White manured you ask me, and I will say in reply to that, under some circumstances it would be, perhaps, as good as that.

I said White only claimed south of the railroad, that is all I ever knew of. As to whether I can give a description of it as he claimed it, will say, I can give the description as he staked it out and was supposed to claim. As to whether I can give you that description that he filed in the Recorder's office, that possessory right, will say, I have seen the possessory right, can't give you description in it word for word; can give it to you as I understand it, but as I say not word for word. As to whether I know that description runs north of the railroad originally, will say, I don't think it was intended to; don't know whether it runs north of the railroad or not.

Defendant's Exhibit No. 7, was then handed to witness, and witness proceeded as follows:

You ask me to look at this and see if it does not run north of the railroad, part of it, to see if according to this it does, will say,
206 Yes, I think it would run north according to that by this description it would run north, run up in north of the railroad track.

Thereupon in answer to a question by Mr. Allen, requesting the witness to give the description of the part that, according to that description, would be north of it, and where it is, the witness said, As near as I could plat the ground out in my own mind where it would run across the track, it would cut in somewhere near across from where the old Stevens place was, or somewheres in there; don't know just exactly where it would cross the track.

Thereupon the cross examination was resumed by Mr. Stephens and the witness testified as follows:

You say you can tell according to the map but cannot tell according to this; but that is what you are asking me. As to whether that description beginning at that point indicated there would run across a small portion of this forty on the north side of the track, will say, Well, I should say, yes. I would not be positive about it because I don't know. I never measured the land out; don't know just where it would run; never measured the line; don't know as I could tell you where it run even if I was right there, because "due east" is a hard proposition to say exactly where it is; don't know whether it would cross this land or not. As to whether I was mistaken in saying that this claim was entirely south of the track, will say, I don't think so, not in regard to this forty in there. The track
207 makes a bend in there. If it would run in a straight line it might throw it in south of the track, as I say, I can't be positive about that. If I had the whole tract I might take my pencil and give the lines, but only across this one forty I can't say; across what I understand that forty is the line runs in pretty near a straight line.

I know Duffy; couldn't say the exact time I met him. I met Paul Duffy along in '90 or '91 when I first came to the country; couldn't say whether he was there in '92 and '93; Paul has been there a long time; don't know whether Paul was there at the time of the strike known as the "Coxey Movement" in '94, or not, couldn't say where he was living; don't remember him claiming any land in round east of Mosquito creek. As to whether he and Bruce Gillispie took a ranch there, will say, As I understand it Gillispie place was afterwards taken up by Mrs. Mead; that was down in north, or east of —— As to whether between Mrs. Mead's and the railroad, I couldn't say as to the boundaries at all; don't remember where his boundaries were; don't remember that Gillispie claimed part of this forty north of the railroad —— You say you mean Duffy, will say, I do know the Stevens' place —— Stevens claimed this place in north of what is known as Mosquito creek; don't know that Duffy claimed it after Stevens left in '92, '93 or '94; wouldn't say he did or didn't. As to whether he made some claim there immediately after the survey was made, will say, I told you I didn't re-
208 member whether Paul claimed anything in there at all. In my own mind I don't believe he did but don't know whether he did or not. I do not know that he and White had some discussion as to their claims, as to this immediate portion of the forty north of the railroad.

As to whether I ever talked with White about this claim in '91, 2, 3 or 4, will say the Whites and I were intimate during those times. I suppose them times there was hardly a day but what we were together. As children all the time, as a rule, we played together. I was eleven years old in '90; in '91 I was 12 and so on up. As to whether I was talking to Mr. White about this land when I was eleven, twelve or fourteen, will say, Nothing only what would be talked between children and parents back and forth. I was not negotiating with Mr. White or anything of that kind; don't know as to talking with him about what he claimed. I know what was understood he claimed; can't say I had any positive talk with Mr. White during the years '93, 4 or 5 or either of them. As to whether it is a matter of fact that I did not, will say, I wouldn't say I didn't. I say I couldn't say positively that I did.

As to whether at the time my father and Mr. White went on to this forty there was an old fence that had been put up by somebody else, Mr. McQuaid for instance, will say, No. I think Mr. Rhodes put up that fence. As to whether the first fence that was ever built there Mr. Rhodes built before either of them went there,
209 will say, I do not swear positively whether there was an old fence there or not.

The following question was then propounded to the witness:

Q. This fence that you are talking about is there now? Is there a fence there now?

Answer. Yes sir.

The witness then proceeded as follows:

The fence that is there now is on about the same line west of the

ferry road, along a public road, this ferry road. As to when the fence that is there now was built and who built it, will say that some of the remains of the poles of the old fence still lay there; some of it is new fence built of logs and poles, as White cleared up they were replaced by rails. At the time Mr. Whitcomb had that place and claimed it, the two of them went on there, one took one place on one side of the road and the other the other. Whitcomb had that land west of the ferry road as a homestead and he put up his fence; then, in '95, after they found out that Whitcomb was advised that he couldn't take this up as a homestead on account of that being occupied for trade and business, they took it up for a government townsite. As to whether he claimed it as a homestead up almost until the time White made his entry, will say, Up until he found White was going to file on the whole thing, up until just before White made his entry. He intended to enter it as a homestead until he found
210 out he couldn't. Judge Woody, of Missoula, advised him that he could not. Then he tried to get it as a townsite; didn't want to lose his home. I believe that when my father was claiming it as a homestead White was claiming his homestead at the same time; my father certainly knew that. As to whether they were both claiming the whole forty as a homestead, the forty they were on, will say, Their claims were as I say, one on the lower side of the track west of the ferry road and the other on the lower side of the track east of the ferry road. It is not true that each of them was claiming the whole forty. My father was claiming as a homestead south of the track and west of the ferry road and White claimed south of the track and east of the ferry road; that was part of the forty in controversy here, part of the townsite forty.

As to whether, after my father found he could not get it as a homestead he instigated the townsite proposition, will say, After he found out he went to White first and says to White, as I understand the deal, this is what comes to me. He went to White and says to White, he says, "White, I understand you are going to enter this whole thing, my home and all, as a homestead and file on it" He says, "I am sir." He says, "White," then he says, "White, you are not in position nor I am not to go into a whole lot of expense over this land." White says, "I will have it all or none." This was just before White filed. As to whether this was before my father had consulted this man in Missoula I couldn't say; don't know
211 whether it must have been; don't know whether my father would be claiming it as a homestead if he had been advised that he couldn't. I know that is the first time White claimed anything in there that we knew of. If my father didn't know it when he went to him he knew it when he came back.

As to whether father left White out of it when he went to Missoula to see about it, will say, I do not know anything about who he left out of it.

I was living at Clark's Fork at the time of the hearings in the land office; couldn't say as to dates whether first one was in early part of '96 and the second one in 1902. Mr. White did not prevent me from being present or appearing there as a witness; don't think he

could. He never tried to prevent me from being present at either one of those hearings; never tried to prevent anybody else as far as I know; as far as I know anybody that wanted to was there and testified in their behalf as to their claims.

Don't know that I ever heard of Gillispie filing a contest on this forty; don't know whether I would have heard of it or not if anything of that kind had happened; as to whether I was taking interest enough in it to have heard of it, will say, I suppose I would have heard them talking about it. I was not doing the business.

The townsite claimants did not go to work there and get White out of his job, not after the townsite claimants got him into
212 his job. That is not so very new. They did not go after White through his job. I do not know they sent all kinds of complaints and finally caused his removal from that office. As to whether I ever heard of that, will say, I know they sent in complaints, and they had a right to send complaints. We had a petition in circulation to have him removed, and we had one there to have him put in there too. White was opposed to everybody in the depot. He would tell you he didn't know anything about trains or anything of that kind when it would only take him half a second to turn to the key and find out, and wouldn't tell you anything about freight. We had freight come there and express, we could never tell anything about it. I don't know that we put up all kinds of jobs to get him out.

Thereupon the witness was excused.

Defendants thereupon offered in evidence a certified copy of the sections of the original plat of Township 55 North of Range 2 East of the Boise Meridian and of the certificate of the surveyor general for Idaho endorsed thereon, as the same appears of record in the U. S. land office at Coeur d'Alene, Idaho; the same being certified to by R. N. Dunn, register of said land office.

The same was marked for identification, Defendant's Exhibit No. 8.

Counsel for defendants stated that the map was offered for two purposes:
213 1. To show that Clark's Fork is marked thereon as a town.
2. The record shows that the map was used at the hearing in the land office, and there is some reference to it, and we want to show exactly what was before the land office at the time.

"Plaintiffs by counsel objected to the introduction of said certified copy of portion of plat upon the same grounds and for the same reasons specified and urged as objections to the introduction of Defendants' Exhibits 1, 2, 3, 4, 5 and 6, and hereinbefore stated, and all other objections hereinbefore stated or specified, which objection was by the court overruled, to which ruling of the court plaintiffs duly excepted, and said exception was allowed by the court.

The said map was received in evidence marked Defendants' Exhibit No. 8, and appears set out at page 943 of this transcript.

Whereupon, GORDON DOUGHERTY, was called and, being duly sworn as a witness on the part of the defendants, testified as follows:

(Examination by Mr. ALLEN:)

Reside at Clark's Fork, Idaho, where have resided since 1888; am acquainted with John E. White, the plaintiff here. He came to Clark's Fork, to the best of my knowledge in 1890.

At the time he came here how much town was there at
214 Clarks Fork?

"Plaintiffs by counsel objected to this upon the same grounds and for the same reasons urged as objections to the introduction of Defendants' Exhibits Nos. 1, 2, 3, 4, 5 and 6, and hereinbefore stated, and all other objections hereinbefore specified, which objection was by the court overruled, to which ruling of the court plaintiffs duly excepted, which exception was allowed by the court.

"All of the evidence of said witness Gordon Dougharty relating to any and every matter other than concerning the value of the use and occupation of the land in controversy was objected to by plaintiffs upon the grounds and for the reasons above stated, and said objections were at the time overruled, and exceptions duly taken by plaintiffs and allowed by the court."

At the time he came to Clark's Fork there must have been about ten residences * * * business houses; and I should say there would be there at that time then in and around Clark's Fork, right there in that vicinity and camp, right there, about a hundred people. Mr. White's business when he came there was, he was operator for the Northern Pacific, and he was agent as well as operator.

As to whether I know of Mr. White's taking up a ranch near there anywhere, will say, he took up a piece of land on the south of the railroad track known as the Proctor claim. He took that up in
215 about * * * He put up his notice on that claim about the time he came there, a little after he was there. At that time he claimed from McQuaid's fence east of the depot, where the depot is, where the depot was at that time * * * At the time he came there they put up a depot after he came, right before that time * * * Any way he claimed from where the depot is now, 200 yards east of that, on McQuaid's land, running south to the river, or southwest, whatever direction that is; thence he ran up Clarks Fork river to the Clarks Fork bridge and the right of way; then he came back to where he started, to the county road there, which must have been put there in '92 or '93. I describe this claim as commencing about 200 yards east of the depot, south of the railroad track, running south to the river and up the river to the Clarks Fork bridge, and then west to the place of beginning. He did not claim anything north of the railroad track up at that date.

John McQuaid owned the tract of land immediately west of his tract and south of the railroad track. Moses P. Whitcomb bought it from McQuaid.

Mr. White moved on to the place about two or three years after he put up his notice on it at the time I said. Moses Whitcomb's house was constructed before Mr. White's house was.

In 1895 I first learned of Mr. White's making any claim to land lying north of the railroad right of way in this forty the north-
216 west ¼ of the southwest ¼ of section 2; recollect the date Mr. White filed on that ranch in the land office, November 27th, 1895; first learned of his claiming that land right after he filed, not before. Mr. White never did anything to the land north of the track in the way of cultivation or improvement prior to the time he filed on it in the land office. He never claimed anything there.

As to the lots I claim in this townsite, what lots I am in possession of, will say I am in block 10, lots 5, 6, 7 and 8, fractional lots, according to this plat Exhibit No. 1. They are all fractional lots; have occupied no other lots in this ground in dispute besides these.

I heard the testimony of Mr. White and Mr. Brown and Mr. Roberts about the value of the use of this land. The value of the use of this land for garden or agricultural purposes or any other purpose is owing to where the land is. There's part of these lots up in Clarks Fork. * * * I will call your attention to lot 8, there is a fraction is all boulders. You get the boulders off and you will get a foot of sand I should judge. It is wash, six foot loam and sand to the rock; should think a dollar an acre would be good rental for it. I know this land Mr. White testified about raising such a crop of potatoes, cabbages and vegetables on down on his own land south of the track; part of that land has been brought into good condition by labor and fertilizing, by being tilled and manured. This land on this townsite lying north of the railroad track occupied by these de-
217 fendants here would be no good unless it was built up, no good at all unless manured and built up. This part north of the railroad has * * * the land there chiefly has all got stumps on it yet. The stumps were removed from some of this land but not many; couldn't say just how thick they are, but there would be eight or ten to the lot. The lots are 25 by 110 as near as I can tell.

Thereupon the following question was asked the witness:

Q. I will ask you this question for the purpose of making the record. When was it the houses were moved off from the railroad right of way back onto the townsite?

Objected to on the ground that it has been asked once and ruled out.

The objection was sustained. To which ruling of the court defendants, by counsel, then and there duly excepted and the exception was allowed by the court.

The following question was then propounded to the witness:

Q. You may state whether or not, at the time Mr. White filed on this land, the houses had already been moved off from the right of way?

Objected to on the ground that it is wholly immaterial; nothing in the pleadings to warrant such a question.

The objection was sustained. To which ruling of the court
218 defendants, by counsel, then and there duly excepted and their exception was allowed by the court.

The witness then proceeded as follows:

In November, '95, at the time Mr. White filed on this land, there were in this town, north of the railroad track between twenty and twenty-five dwellings, stores and hotel. There were from 20 to 25 houses, consisting of two stores and postoffice, chop house, restaurant and hotel, residences, houses I mean, blacksmith shop, there must have been fifteen residences; school house. The school house was on the Melder townsite on the first survey which was made before the official survey.

The following questions were propounded to the witness:

Q. Were there any other residences near there on the outside of this forty acres, this N. W. ¼ of the S. W. ¼ of section 2, were there any buildings outside of that?

—. Yes sir.

Q. How many?

Objected to as wholly immaterial; all been gone into before the land office.

The objection was sustained as immaterial.

To which ruling of the court defendants, by counsel, then and there duly excepted and their exception was allowed by the court.

219 The witness then proceeded as follows:

There were about a hundred inhabitants in this town at the time Mr. White filed on this land November 27th, 1895.

As to what Mr. White ever did towards fencing his claim south of the railroad track. He enclosed it in '93, the whole of it. He built the fence from the county road running east to Clarks Fork railroad bridge, on the south side of the railroad track, about 150 feet from the railroad south of the railroad. The fence was about a hundred or a hundred and fifty feet from the railroad, south of it, built along parallel with the railroad. As to where the other fence was, will say. He made the Clarks Fork river a boundary, and he made the county road, he had a fence along that joining the ferry landing, that was the other boundary. He built the fence from the northwest corner of his claim there near the depot, south to the river. And he built a fence then east from this northwest corner, parallel with the railroad, to Clark's Fork river on the east; and the river formed the other boundary; these fences were built in 1893.

As to whether I ever had any talk with Mr. White as to how much land he claimed there prior to his filing, will say, Mr. White never claimed to me any * * * always claimed on the south side; never claimed north until the survey of '95, up until the survey was made at the time of the filing. That survey was made in the field in '95, don't remember just the date.

220 Q. How long was it before he filed that he claimed anything on the north side?

Objected to as immaterial and not the best evidence.

The COURT: Yes, there is better evidence of when the survey was made.

To which ruling of the court defendants, by counsel, then and there duly excepted and their exception was allowed by the court.

hereupon, on cross examination, by Mr. Stephens, the witness, DON DOUGHERTY, testified as follows:

emember your visit to Clarks Fork. As to whether I remember
n you came to see me about the matter I threatened to shoot you,
say, I never did; never said if you came to me I would shoot
, or would shoot any damned lawyer who would bring a lawsuit
Mr. White; never said such a thing. I may have made some
observation as that I was through with lawyers and if one came
d me I would fix him plenty. I did not say such a thing as that,
damned lawyer that would bring a lawsuit for Mr. White I
ld shoot him. I didn't say any lawyer that would bring suit for
White I would fix him plenty; didn't make that remark; may
e made some such.
s to whether I had moved off improvements that I swore in the
land office were worth three thousand dollars, I moved three
off; left on there the body of the hotel, by that I mean the
main portion of the hotel. There is now on the property I
ned a blacksmith shop and stable, and ice house; still on there.
to whether I testified in the second hearing before the land office
the buildings which I moved off there were worth three thousand
ars, will say, I don't remember that date; don't remember; re-
nber of testifying; remember I gave the valuations, but just what
as I do not remember at the present time. I testified I paid
erts three thousand dollars. I tes-*if*fied it was worth three thou-
l dollars, but I don't remember, don't know now whether it was
e buildings or the Roberts building; or whether the Roberts
lding had been burned before this and I had rebuilt them at a
of three thousand; hotel then was worth three thousand dollars,
the other improvements $150. I have not taken part of those
rovements off of this land. I think those improvements were
ned off. You say the improvements that you are talking about
the improvements that were on there at the time of this hearing
he land office and ask me if those are not the improvements which
oved off, and in reply to that I say, I think they were burned off.
n't give the date when they were burned, it must have been in
0 when they were burned, but I wouldn't swear to that. As to
best recollection, will say, in 1900, before * * * I can't
remember whether it was 1901 or 1902. I think I made my
testimony in the land office in '97, if I ain't mistaken. I
couldn't swear to it. That is the best recollection I have got.
memory is not good. My memory is good on facts, but such
es as that * * * It was '97 the Roberts buildings were put
there. If I was not at the land office in '97 at all, but it was in
2 to '95, not later, it would not mean that I am making the same
takes on the rest of my dates. I was at the hearing in the land
ce on March 26, 1902; was not a witness in '97 or '96 either one.
hen I was talking about I said I thought I was a witness in '97,
hink I was thinking about giving in my evidence there to the
rt in Cœur d'Alene in '97; that's what I was thinking about at
time.

In answer to questions by the court the witness testified as follows:

As to whether I was a witness before the land office in '97, will say, I gave evidence in to Cœur d'Alene; at the land office at Cœur d'Alene in 1897 was not what I said. I did not give evidence * * * I was not a witness at the land office in Cœur d'Alene in 1897; was a witness there in 1902; that was the only time that I was a witness there.

Thereupon Mr. Stephens resumed his cross examination and the witness proceeded as follows:

Was not prevented from going there as a witness nobody prevented me from going or tried to do so; did not have just as much interest then as I have had since. I had more interest since; had
223 bought the buildings from Roberts in 1897, and that burned down and I rebuilt it; bought that, I think, in the spring of 1897 from Roberts, George Roberts. As to whether I had a clear understanding at that time that it was on the right of way, will say, part of it. As to whether I made an affidavit dated in October, 1899, in which I say, referring to the purchase of this property from Roberts, "This deal with Roberts was for cash only with the clear understanding that the land that the building was situated on belonged to the Northern Pacific railway company for which Roberts held a lease assigned to me," will say, I signed that affidavit, but that affidavit was never read over to me because White and I was the best of friends. I believe I signed it before Mrs. Thibedeau, notary public.

The following question was thereupon propounded to the witness:

Q. You remember of testifying at this land office hearing in 1902 I believe? At that time and on that examination was this question put to you, and did you answer it as follows:

(Counsel reads from pages 108 and 109 of Defendants' Exhibit No. 2.)

Q. Mr. Dougherty, an affidavit we find filed for record here purporting to have been sworn to by you, in the presence of Mrs. Thibedeau, in October, 1899, reads as follows:

"STATE OF IDAHO,
County of Kootenai, ss:

224 Gordon Dougherty, being first duly sworn, says. That he has been a resident of Clark's Fork, Idaho, for a number of years, and that in April he purchased of George Roberts his hotel and saloon and general merchandise business and buildings at said Clark's Fork, but at no time during his deal with said George Roberts or before or afterwards was any hint or mention made by Roberts of any contract he (Roberts) had with John E. White relative to any agreement or promise the said White had made him (Roberts) respecting any portion of the homestead claim of White; that his deal with Roberts was for cash only, and a clear understanding that the land the buildings were situated on belonged to the Northern Pacific Railway company, for which George Roberts held a lease and transferred to him."

"(Signed) G. DOUGHERTY."

Did you make this affidavit?

A. That is all right; I remember that.

Did you so testify in the hearing at the Cœur d'Alene land office?

A. I only signed that affidavit——

Q. I am not asking you if you signed the affidavit. I am asking you if you testified in the Cœur d'Alene land office in 1902, as I have read, when you were asked the question if you made that affidavit, you said, "That is all right; I remember that." Did you so testify? Did you make that answer?

Answer. I think I did.

The witness then proceeded as follows:

225 As to whether it was true or not, will say, I never testify false; never tell anything false if I know it, never did. You prove that. As to whether I made a false affidavit there, will say, I must have. It was not read to me before it was signed. I didn't read that affidavit. White said it was all right at the time he handed it to me, that affidavit. As to what I said in the land office at Cœur d'Alene that it was all right for, will say, well, that is all right. I have said three times that I said when I testified in the Cœur d'Alene land office that was all right, that I remember that I said that.

I said there were from 15 to 25 houses there at the time Mr. White made his entry; don't know how many people on an average were in each of these houses, but there was about 100 to 150; there was 100 people there, about that, on this part of the forty north of the railroad track at that time White made his entry; testified about the number of houses in this hearing before the land office and said that there were about the same.

As to the number of people in each house and the number of buildings in use there when White made his entry and when he made his final proof and the number in each family, will say, I will call them off and you take them down. I had a warehouse there, and had a residence right on the townsite and on this forty; was not on the right of way; Mrs. Thibedeau; don't know how many there were in her family. The second house, it was called

226 the Hughson house. There was two departments in it and had another family in the other end; don't know how many there were there; some times there were two at Thibedeau's and sometimes more; there were generally two. I will have to put in another house. I live in one house and this clerk of mine lived in another, dwelling houses with two different families in them, both my houses; there was the husband and wife and one child in my clerk's family; Mrs. Loyd next; don't know how many in her family; she didn't have a husband; she had different daughters, some married; some of them lived with her; could not say how many. The next one is Moses Whitcomb. He was south of the track on the forty; there would be about five in his family I guess; The next one, I think it was Foreman that lived there; three or four or five in the family, four any way;

Next one, Jason Edwards; three there was in his family;

Next one Brochton Dougherty; two in his family;

That's all I can think of that were there at the time of his entry. There were six in my family at that time. As to whether I resided on this disputed tract or any part of this forty, on the right of way or off from it, will say, My family was off this forty, on the same townsite. As to whether we come out as far as this forty is concerned, will say, helped to make the town.

227 You go over the list I have given and say there are twenty and ask me where the other people were that constitute that hundred, will say, They were round in the vicinity, in the hotels; seen Roberts have forty or fifty; didn't put in those he fed, didn't count them at all. Then there were miners and prospectors. You say you are asking for permanent residents in occupation of any part of this forty acre tract at the time of Mr. White's entry and at the time Mr. White made his final proof, and I say, They were living down on the townsite, on this forty, most of them, on the forty acres in litigation; have given you all I can remember.

As to where the hotel was, The Butler and Foreman house was the same, Butler and house Foreman house was the same.

I said I saw Mr. White's fence in 1893; said Mr. White fenced there in 1893. He did not have an orchard there and fence that before that time. Mr. White was in possession there in 1892 to the best of my knowledge. He never claimed anything on the north side until after the survey. Immediately after the survey he commenced claiming on the north side; everybody there understood that after the survey in '95, immediately after the survey; everybody understood that as far as I know; I understood it. After the survey was made he claimed the entire forty on which his house was located.

I think I said that Mr. White took what was known as the
228 Proctor place. The Proctor house was north of the railroad. Mr. Proctor had lived in that house, and Mr. White, as I understood was claiming all of the Proctor place at the time he went there.

As to where the McQuaid place commences with reference to White's house and the county road as it is now, will say, It started from the county road east of the depot, running south to the Clarks' Fork river; then running down to the mouth of Lightning creek and up to Lightning creek bridge, back to place of beginning again on the south of the Northern Pacific railroad track. McQuaid was living there at the time White went on this land and commenced to claim it. He had not moved away. His house was up west of the depot on the south side In 1891 McQuaid was working for Bill Conner. He was living up in that place where I told you, up in that building. He had not moved off when Whitcomb moved on to that tract there; think he stayed there a couple of years. As to where he did go, He is there yet. He was on railroad land; he was not on a Government section at all.

I didn't make any such observation as that this land is not worth anything up there for raising stuff on; said it would have to be fertilized. If you improve it, fertilize it, work it and cultivate it you can raise * * * It would cost about fifty to a hundred dollars an acre to get it in shape; would put manure on it to fertiiize it;

did not fertilize any of these lots I claim; never raised any-
229 thing on them; never tried; not much of an opportunity to try; building pretty near cover it.

As to whether it is a fact that many of those people have good gardens there, as good gardens as I can find anywhere, north of the track, will say, if you go there now you will not find very good gardens. They are about the same as they were in August when you were up there. I think those were pretty poor. The land is not all over the same. It goes in streaks, the sand and boulders, can't tell exactly how much there is in each streak.

As to whether Catloe raises as fine stuff and White does without any manure, will say, that Mr. Catloe, to my knowledge, has put two coats of manure on that meadow. I have not been over to see and don't know anything about what kind of a crop Mr. White has across the road from Mr. Catloe where it has not been manured.

Thereupon, on redirect examination, by Mr. Allen, the witness GORDON DOUGHERTY, testified as follows:

I said Mr. White took what was known as the Proctor ranch and that Proctor's house was on the north side of the railroad. This Proctor house must have been three quarters of a mile east of the town and was within about three hundred feet of the bridge and is standing there yet, an old shack.

230 I said that immediately after the survey in '95 White begun to claim this land north of the railroad. I think the survey was made in '93. As to whether I remember when the survey was made, will say, I think it was made in '95.

Thereupon the witness was excused.

Court at this time took recess till 2 o'clock p. m. today.

THURSDAY, *July 13th, A. D.* 1905.

P. M. Session.

At this time the trial of this cause was resumed, present as before and proceeded as follows:

ROY WHITCOMB, was recalled and testified as follows on behalf of defendants on examination by Mr. Allen:

"All of the evidence of said witness, Roy Whitcomb, relating to any and every matter other than concerning the value of the use and occupation of the land in controversy was objected to by plaintiffs upon the grounds and for the reason urged as objections to the introduction of Defendants' Exhibits Nos. 1, 2, 3, 4, 5, and 6, and all other objections hereinbefore specified and said objections were at the time overruled, and exceptions duly taken by plaintiffs and allowed by the court."

Examining this map of the townsite, Exhibit No. 1, the part lying south of the railroad right of way including blocks 11, 12,
231 13, 14, 15 and 16 of the townsite and stating how much of that is now occupied by myself, my mother and the heirs of

Moses P. Whitcomb, will say, we have enclosed all that up to, I think it is in block 11; giving the number of the lots, to 5, 6, 7 and 8 and 9 and 10 in block 11, somewheres in there I am not just positive as to measurement. We go clear to the quarter section line; that fraction in there. Mr. White occupies the balance of blocks 11, 12, 13, 14, 15 and 16 besides what we occupy. He is in possession of them; that is where this big crop was raised, on part of that. Approximately the only part of this in our possession is lots 5, 6, 7, 8, 9, 10 block 11 and the fraction lying west of that block, have never measured it to know just where it lies because didn't expect to want to know. As to whether blocks 11, 12, 13, 14, 15, and 16 were enclosed by fences, will say, We had everything enclosed west of the Ferry road, everything west from there.

As to how Mr. White came to get possession of the part he occupies now and when he got possession of it, will say, As near as I can remember it must have been in '97, '96 or '97, he entered in there, about that time. He went inside of our enclosure. We had it enclosed in our old pasture before ever he went into possession of it. It was enclosed at the time Mr. White filed on it in 1895. Our house was inside the second enclosure. We had the whole field enclosed in an enclosure and the house was inside the garden that was enclosed by itself. It was all inside the field and the
232 house was inside of that in another enclosure.

Thereupon, on cross examination, the witness, ROY WHITCOMB, testified as follows:

My father had that fenced; his money paid for it. Mr. Furnis did not build that fence. As to whether I was about eight or nine years old, will say, I was eleven years old when I came there in '90. We have enclosed now somewhere about an acre and a half I should judge; don't know as to the measurement exactly because I never measured it; may be an acre, may be less than an acre; may be an acre and a half.

Since 1897 I say that Mr. White has had possession of all of it except that acre and a half if there is an acre and a half. At the time he took possession of it the old fence was up there, along in about that time. As to whether the fence was down when he took possession, will say, I wouldn't swear it was or was not. In fact I don't know.

Thereupon the witness was excused.

Thereupon, JOHN RHODES, was called and being duly sworn as a witness on the part of the defendants, testified as follows on examination by Mr. Allen:

"All of the evidence of said witness John Rhodes relating
233 to any and every matter other than concerning the value of the use and occupation of the land in controversy was objected to by plaintiffs upon the grounds and for the reasons urged as objections to the introduction of Defendant's Exhibits No. 1, 2, 3, 4, 5 and 6, as hereinbefore stated, and all other objections herein-

before specified, and said objections were at the time overruled, and exceptions duly taken by plaintiffs and allowed by the court."

Name is John Rhodes; live in Clinton, Montana; have resided at Clarks Fork; resided there in '90 and was there till '94, from '90 until 94 in the spring; know where the town of Clark's Fork was; where they claimed it was; know Mr. White the plaintiff well enough; I think I knew Mr. Moses P. Whitcomb in his life time. I worked for him. I know about the two ranches of White and Whitcomb, where they were at that time near Clark's Fork; worked on one of them; worked on Moses P. Whitcomb's ranch; built the house on it in the spring of '91, in about the first of April. As to what else I did on that ranch will say, Why, I cultivated land there. As to what I did towards making any fence, will say, There was an old log fence there; it was only a short distance. As to where that log fence was with reference to Mr. Whitcomb's ranch and Mr. White's ranch, will say it is supposed to be the dividing line between Whitcomb and Mr. White. I know where the county road now runs from the railroad running to the ferry, to the river. As to where that fence was with reference to where that road now
234 is, it ran right along there. I built that fence as soon as I moved there in '91, fenced it up. There was some logs laying along there. I remodeled it with logs and poles and put wire on top. I built from the railroad to the river.

I guess I know when the house was built on Mr. White's ranch. It started in the spring in the latter part of the spring, laid his foundation; the house was not finished, was not built; that was in '91, the same year I built the house for Mr. Whitcomb. As to when it was finished, I think I done some work on Mr. White's house after he moved into it, which I suppose was in the spring of '92. I lived there in '94, in the spring. Mr. White made no objection to my building the fence there when I put that fence on the line between White's ranch and Whitcomb's ranch.

Thereupon, on cross examination, the witness, RHODES, testified as follows:

As to whether I simply removed White's fence that was there, will say, There was only part of the fence; fixed that up and continued it on to the river. I did not also build a picket fence in front of the house, Whitcomb house, parallel with the railroad. I guess that was not built in '91. As to whether there was a fence there made of pickets from shingle bolts, will say, That was not built there until after I moved off the ranch myself. I lived there from spring till October. As to whether I had any family there at that time, Nobody but my daughter there some times with
235 me. As to whether I was living with Mr. Whitcomb, I was living with myself. Mr. Whitcomb was not living in the house when I was there. As to whether he lived there in '92, Mr. Whitcomb didn't move in there when I moved out of the house. He moved some of his stuff in there; couldn't tell exactly when he moved

into it myself. He did not move into it till the next spring that I know of.

He was foreman of the bridge gang of the Northern Pacific Railroad Company at that time, traveling from place to place in a car with the bridge men. He went from Missoula to Hope, Idaho, preparing bridges. He did come from Missoula, didn't go that far, but he went all along the line east and west from Clark's Fork. He lived in the car when out on the road.

That picket fence was built after I left the ranch along the road; couldn't tell exactly how far that is from the railroad track, the picket fence in front of the house I mean. It must be about 200 feet. As to whether it was my understanding at the time the fence was built that it was 200 feet away from the railroad track, will say, No, I have no understanding. I did not notice when the fence was built myself. I was living in Clark's Fork and was working in an outfit after I left it myself. I do not know why Whitcomb put that house so far away from the track.

As to what I raised there, I raised garden stuff and potatoes. As to whether I could raise anything, I raised some of it. It
236 was not very good.

At that time the land was unsurveyed. Everybody knew it was unsurveyed as far as I knew. White and Whitcomb both understood that it was unsurveyed I suppose; they ought to. As to whether it was surveyed before I left there, It was surveyed in '93 before I left; couldn't say what time in '93; it was in the latter part of the fall or summer some time. I didn't pay any attention to the survey.

I never had any talk with White about this fence I am talking about being on the line between his and Whitcomb's place. There was never nothing said but, of course, the understanding was that was the line fence. As to whether I got that understanding from Whitcomb or from White, will say, why, I got it from both. I never heard Mr. White claim anything inside of that. As to whether until after the survey was made, will say, Well, he never claimed it to me if he did, only when I met Mr. White in Missoula one time quite a while afterwards.

I went away early in the spring in '94. From the time the survey was made up to the time I went away in the spring of '94 was living on the right of way below the depot. I was not living in the section house. I bought a house; couldn't tell you who from; Mr. White knows better than I do. But I bought there. When I went away I sold it. . . Well, I didn't sell it until after I went away. I left it with Mr. Nagel. Mr. Nagel sold it. I leased from the
237 railway company; was occupying under that lease, but not exactly as long as I was there, after I left the Whitcomb house. As to how long I was under that lease, will say, I was living in Brock Dougherty's house; that was off his forty acres, off that land. As to whether any time I was on this forty acres in controversy in this action I was on the right of way under this lease from the railroad company, will say, Yes.

Thereupon, on re-direct examination, the witness, RHODES, testified as follows:

I said in answer to question of counsel that when I lived on the forty acres in controversy I lived on the right of way. The summer I lived in the Whitcomb house I was not living on the right of way.

Thereupon the witness was excused.

Whereupon, JOHN REED was called and, being duly sworn as a witness on the part of the defendants, testified as follows:

"All of the evidence of said witness John Reed relating to any and every matter other than concerning the value of the use and occupation of the land in controversy was objected to by plaintiffs upon the grounds and for the reasons urged as objections to the introduction of Defendants' Exhibits Nos. 1, 2, 3, 4, 5 and
238 6, as hereinbefore stated, and all other objections hereinbefore specified, and said objections were at the time overruled, and exceptions duly taken by plaintiffs and allowed by the court."

Name, John Reed, reside Clark's Fork; am in possession of lots in Clark's Fork, Idaho; am in possession of three lots in block 9, examining this map, here they are here; they are in block 9, lots 8, 9 and 10 of this townsite, block 9. There are three fractions more, I don't know, I can't describe them for a certainty. I never took any notice. I don't know hardly where it is even from examining this map. I guess the numbers of it is 13, 14 and 15 in block 2; guess may- it is 12 too; have either three or four lots; am not sure. Examining this plat I believe these are the ones as near as I can tell, lots 12, 13, 14 and 15 in block 2. Now as to whether the lots I own in block 9, lots 7, 8, 9, 10, block 9, are where buildings are, will say, Yes, sir; have been in possession of that since three years the last of June. The grantors of this lot, these lots, have been in possession of them since 1889, and I by and through them. The hotel is on these lots, 7, 8, 9, 10, in block 9; am the owner of the hotel furniture and fixtures. Without anything in it a fair rental of that hotel without the furniture and fixtures, the bare hotel, would not be very much, from ten to twelve dollars a month.

Thereupon, on cross-examination, the witness, JOHN REED,
239 testified as follows:

There are fourteen rooms in the hotel, that is bedrooms; then there is the bar room, dining room and kitchen, and barber shop. As to whether the building's dimensions are fifty by fifty or something like that, will say, It is in two parts; one part is about 20 by 40; don't know for certain; may possibly be that much; never measured them; without anything in it it would not be worth only ten dollars a month. I do not think the bar room is 20 by 50; never took measurement of the dining room to know whether it is 20 by 30. All that building would only be worth that much part of the time according to other buildings around it. The one

just beyond it is not nearly so large, as to whether that rented for $25 a month, will say it was empty for a long time, nothing in it. As to whether that is because they refused to rent it for twenty-five dollars, will say, I don't know anything about the refusal. I notice it is empty; don't know anything about its being offered or any one offering to rent it for twenty-five dollars a month and its being refused to be rented for that.

I am not running the hotel now; don't know how much the building is worth; it would take a man some time to figure up what the furniture and fixtures I have in there are worth. As to what I gave for it, I gave $1500, including the license for that year. As to how much I paid for the furniture, I did not buy the furniture. I bought the whole business as it stands, the whole
240 thing for $1500. As to whether I got it at that price because everybody then understood, because of the decision in White's favor, will say, No, I got it because the man failed in making anything and had to leave it, that run it, a fellow named Davis. I am renting it now; am getting sixty dollars a month for the whole thing, the hotel and furniture that I have in it which I paid fifteen hundred dollars for.

As to whether before I bought it I went and had a talk with White about buying it, will say, No. I did after I bought it. As to whether I asked Mr. White about buying it and he told me not to do so and I told him it would — twenty years before he got possession and in that time I could get all the money I wanted out of it, will say, No, I told him that afterwards. As to whether after I bought I did tell him that, will say, No, I never told anybody that, not that I remember of; I might have. As to whether I remember of going to Mr. White and telling him that I had a chance to sell my ranch and buy this and wanted to know what I better do about it and told me I better not, will say, Nothing of the kind.

As to whether I heard the proceedings in the land office, will say, I heard they were fighting about the townsite, something like that; knew this was involved in it; don't know whether it was after the first decision or the last one of the land office; was not interested in it a great deal at the time or before that. I bought
241 in the last part of June, 1902, about the 23rd of June if I ain't mistaken. I have bill of sale, deed or something of that kind; have it not with me; don't know exactly what date it bears; have rented this last two months for sixty dollars a month; rented it for forty-five before that. As to how long I rented it for forty-five, will say, Well, I sold it and just got it back about—— As to what I sold it for, will say, Because he did not have money enough to pay. I sold it for $1800. The fellow didn't pay and I got it back. He did not refuse to pay because the townsite was in litigation. He went broke and didn't have anything to pay with; that's why; can't tell you how soon after I bought it I sold it; of course I didn't keep track of it; it was longer than a month, two months or three months; to the best of my judgment as near as I can tell it was some over a year and a half, pretty near two years I guess that I had it; during that time I run it myself for six months, then

I rented it; don't remember who I rented it to it was so many I forgot their names; got different prices rent for it from different parties, from forty to forty-five, after I had run it six months myself; then I rented it for a year from forty to forty-five dollars; then I sold. The fellow did not refuse to pay me for it because he said that White had as much right to it as I did. He never told me anything of that kind. He had nothing to pay with. It was Caldwell who refused; that's who it was. He finally made me dig up six hundred dollars to get him out, that's what it was.
242 He didn't make me dig up six hundred dollars. I paid him that much for bar fixtures that was in there. I bought them. As to your thinking I had bar fixtures, they were not good for anything he said. He said that he had bar fixtures, and that if I would buy them and pay him that much cash, he would get out and leave them. He never told me his title was as good as mine and I couldn't make him pay. He didn't say when we were having trouble about collateral he did not say if I didn't give it back he would fix it so it would be no good to anybody, that I know of; did not to my knowledge have conversation with Mr. White in which I made that statement to him; seems as though I would have knowledge of it if I had.

Thereupon the witness was excused.

Whereupon defendants rested, after offering in evidence the balance of the document offered and introduced by plaintiff as Plaintiffs' Exhibit "C," the first part of said document.

The same was received in evidence without objection and marked Defendant's Exhibit No. 9, and appears set out at page 249 to — of this transcript.

Whereupon Plaintiffs offered the following in rebuttal:

Plaintiffs offered in evidence certified copy of the Amended Complaint; Findings of Fact and Conclusions of Law; Judgment
243 and Remittitur from the Supreme Court of the State of Idaho, in the case of John E. White and Roberta B. White, Plaintiffs, *vs.* H. D. Johnson, F. S. Langley, M. W. Caldwell and James Channing.

Same was received in evidence, marked Plaintiffs' Exhibit "G," and appears set out at pages 269 to 290, of this transcript.

Plaintiffs offer in evidence certified copy of the Affidavit of Gordon Dougherty, dated — day of October, 1899, and filed with briefs and affidavits for entry by George H. Lamar, as Exhibit No. 9 in the case of Henry Melder, Probate Judge, as trustee for Clark's Fork townsite etc. *vs.* John E. White, of record in the U. S. land office at Washington, D. C., involving the N. W. ¼ of S. W. ¼ of Sec. 2, Twp. 55 N., R. 2 East.

The same was received in evidence, marked Plaintiffs' Exhibit "H" and appears set out at pages 290 to 292, inclusive, of this transcript.

Plaintiffs thereupon offered in evidence certified copies of certain affidavits, to-wit, Moses P. Whitcomb, Bert Haberman, John E. Foreman, John G. Nagel, John B. Whitcomb, Andrew Hasselroth, Walter S. Flemming and Carpenter Wilson, executed in June 1899 and

filed in the Department of the Interior on July 18, 1899, by E. S. Mussey as counsel for the townsite of Clark's Fork, Kootenai County, Idaho, in the case of Henry Melder, trustee for said townsite against John E. White, now of record in the general land
244 office at Washington, D. C., involving the N. W. ¼ of the S. W. ¼ of Sec. 2, Twp. 55 N., R. 2 East.

The same were admitted in evidence without objection, marked Plaintiffs' Exhibit "I" and appear set out at pages 292 and 302, inclusive, of this transcript.

Mr. Stephens, counsel for plaintiffs, then remarked that in view of the fact that of the anxiety of parties to close the case and get away, the plaintiffs suggest and offer to curtail the trial and evidence in this case, without jeopardizing or prejudicing any right, and will not offer any evidence except as to facts not touched upon by the plaintiffs in the land office hearing, provided, the evidence of the plaintiffs had and offered at the different hearings as is shown by the records or offered by the defendants, shall be taken as evidence on the part of the plaintiffs in this case upon the points covered by their evidence.

"This evidence is offered solely on account of the court permitting like evidence upon the part of the defendants and overruling plaintiffs' objections to such evidence, and without the plaintiffs waiving the right to insist upon the objections made."

To which the defendants, by their counsel, then and there assented and consented.

Whereupon, Mr. BROWN was recalled and testified as follows in rebuttal:

245 Know where the Whitcomb house south of the track is; also where Whitcomb's barn is. The barn is between the county road that runs from north of the railway to Clark's Fork river.

As to whether these potatoes I testified to as being raised by Mr. White were raised round Mr. White's barn, will say, Those potatoes were raised on a piece of ground between Whitcomb's residence and Clark's Fork river, right between Whitcomb's residence and Clark's Fork river and southwest from the barn; they did not surround the barn or right up against the barn; were not near the barn at all.

Whereupon the witness was excused.

Thereupon, COMPTON WHITE, was recalled and testified as follows in rebuttal:

Know about the time the survey of this tract in controversy was made. The field work was done in the spring of 1893, as I——

Thereupon counsel for plaintiffs interrupted the witness and objected to the testimony upon the ground that it is immaterial when the field work is done; field work has nothing to do with that survey; is not a survey until approved by the Surveyor General and plat filed in the land office, does not become an official survey until that time.

The COURT: There is a good deal of testimony in this case as to the time from which Mr. White claimed this tract in controversy, and I think the testimony of the plaintiffs is hat he claimed it as soon as he found out where the lines were after he survey was made in the field. The testimony of the defendants that he did not claim it until he made his filing in November, 895. If I am incorrect I would like to be corrected. I think that the testimony. I think this is proper rebuttal and overrule the objection.

To which ruling of the court defendants, by counsel, then and here duly excepted and their exception was allowed by the court.

"Q. What did your father, Mr. White, do with reference to claiming land patented to him immediately after that survey in the field, and what did he say to you about claiming that land north of the railroad right of way and all of the forty acre tract."

"Defendants by counsel object to this as not rebuttal, which objection was sustained by the court, and plaintiffs duly excepted to said ruling, and said exception was allowed by the court."

Thereupon the witness continued as follows:

Father's potatoe patch lays in there immediately south of Whitcomb's enclosure, on the south side of the track. This ground had never received any manure to amount to anything. No manure had been put on the ground for a long time and then very little. I don't think they would grow on ground not being manured. We found afterwards that it grew a fine crop.

Thereupon, on cross examination, the witness, COMPTON WHITE, testified as follows:

As to whether I was at home when that crop was planted, will say, was there before it was planted, but while it was being planted * * There had been manure hauled on a portion of it, a streak along the meadow, two wagon loads, not very good manure, mixed with sawdust; mixture of cow manure, old manure. This patch of ground was about a hundred yards from the barn where our cattle ranged all winter, the nearest edge of it was about a hundred yards. Our cattle did not range on this land in the winter time because the snow was deep and they couldn't very well get on to it. There is no snow on there in the fall and spring but then that ground is plowed up and cattle didn't go on there very much. I said the nearest line is a hundred yards from the barn, that is 300 feet. I guess the cattle had ranged round the barn about four years.

Thereupon the witness was excused.

Whereupon JOHN E. WHITE, was recalled and testified as follows in rebuttal:

This potatoe patch was about three hundred yards west of my barn close to the fence on the Whitcomb place, on the south side of Whitcomb. That tract hadn't ever been manured. Compton seems to remember some. I think he is mistaken. I don't think there ever was an ounce of manure put on it.

As to cattle running on this land, I will state that in caring for the cattle we kept them housed all winter, at the barn, and kept them entirely off this land in the summer when cropping it, entirely; they didn't go on this land; go down below for water; don't go twenty steps below it but don't go across this land.

I fenced the tract over east of the county road in the fall of '94. The posts had to be put along the right of way because there was no other way at all to fence it anywhere else. The country was just a thicket. You get twenty steps away from the right of way and you get into a wilderness as far as bushes are concerned. The right of way was cleared of big trees and bushes. It was very difficult then even to get a path through the bushes to put my posts down. The mosquitoes and bushes had possession of the country.

Whereupon cross examination was waived and the witness was excused.

Thereupon plaintiffs rested in rebuttal.

Here follows Plaintiffs' Exhibit "A" and "B" being certified copies of the Exhibits A and B attached to the plain-
249 tiffs' answer to the cross complaint and hereinbefore incorporated. Transcript, pages 71 to 102, folios 199 to 293.

PLAINTIFFS' EXHIBIT "C."

"G" M. L. 147146 I. R. C.

DEPARTMENT OF THE INTERIOR.
GENERAL LAND OFFICE.
WASHINGTON, D. C., *Feb.* 13, 1904.

I, J. H. Fimple, Acting Commissioner of the General Land Office, do hereby certify that the annexed transcript of the letters and decisions of this office of July 11th, 1900, March 28, 1901, January 14, and November 18, 1902, and of the local officer's decision of July 25, 1902, in the case of Henry Melder, probate judge, trustee for Clarks Fork townsite, Kootenai County, Idaho, against John E. White of record in this office involving the northwest quarter of the southwest quarter of section two in township fifty-five north, of range two east of the Boise principal meridian is a true and literal exemplification of said letters and decisions.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] J. H. FIMPLE,
Acting Commissioner of the General Land Office.

50 DEPARTMENT OF THE INTERIOR,
UNITED STATES LAND OFFICE,
COEUR D'ALENE, IDAHO, *July* 25, 1902.

HENRY MELDER, as Trustee for Occupants of Townsite of Clark's Forks,
vs.
JOHN E. WHITE.

ecision in Contest Involving the N. W. ¼ of S. W. ¼ Sec. 2, T. 55 N. R. 2 E., Coeur d'Alene, Idaho.

Findings of Fact.

In accordance with letter, division "G," Jan. 14, 1902 on the 26 ay of March, 1902, the above entitled case came on regularly for earing, the Contestant being present by his attorney, Charles L. eitman, and the Contestee being present by person and repre- nted by attorneys, George H. Lamar, James Graham and H. M. ephens. The testimony was submitted by both sides and from e testimony submitted we find the following facts:

Taking up the seven divisions of the subject matter as defined in e above letter in the regular order, we find in reference to the me.

First. The portion of the land in controversy that was included thin the claimed townsite settlement the time of the allowance of hite's entry was all of the platted portion as set forth in the plat file in this case and marked Exhibit "A" and did not include the unplatted portion of the land in controversy south of the
51 N. P. railroad track which has been occupied by White, although all was claimed by the townsite people.

Second. The character of the occupancy and improvements of the wnsite claimants at the time of the allowance of White's entry con- ted substantially of the following properties, buildings and prem- s, used for homes and business enterprises, to-wit:

1. Whitcomb Brothers and Nagle's store on lot 1, block 10, a two ry building, valued about $2,000, used for a general merchandise siness, and for a public hall in the upper entry.

2. A building on lot 10, in block 9, occupied as a saloon and tel, a two story frame building, valued about $1,000.

3. A one story building on lots 1 and 2, in block 9, used as a dwell- g by Jason Edwards and family, valued about $200.

4. A one story frame building on lot 18, in block 9, used partially a laundry and partially as a residence, valued about $150.

5. A one story building on lot 9, block 9, used as a dwelling, value out $200.

6. A building partially on lot 10, block 9, used as a dwelling, lue about $100.

7. A building between block 10 and 8, used as a barn, valued about 00.

252 8. A one story frame building between blocks 10 and 6, used as a dwelling, value about $200.

9. A one story frame building between blocks 10 and 6, used as a dwelling, value about $200.

10. A one story frame building on lot 3, block 10 used as a dwelling and a post office, value about $150.

11. On lot 10 and fraction of lots adjoining in block 11, a one story frame building used as a dwelling by M. P. Whitcomb and family, together with a frame barn, chicken house, woodshed and necessary outbuildings, value about $600. There was also situated within the limits of the land in controversy on November 27, 1895, on the Northern Pacific right of way, a saloon building, hotel, store building and warehouse owned and occupied by George Roberts. These improvements together with a pump, closet and orchard which are off of the right of way and on the land in controversy, were worth about $2,000.

Altho- there was conflicting testimony with regard to the value of these buildings, these figures are borne out by expert testimony introduced on behalf of the Contestee.

Third. The portion of land in controversy that was included in the claimed townsite settlement at the time of submission of proof on White's entry on November 29, 1897, was substantially the same as it was on the date of filing on November 27, 1895.

253 Fourth. The character of the occupancy and improvements of the townsite claimants at the time of the submission of final proof on White's entry on November 29, 1897, was substantially the same as it was on the date of filing, November 27, 1895, there being only a slight change in value, business enterprising and occupants of the claimed townsite settlement between these two dates, November 27.

Fifth. The entryman, J. E. White, did not by acts or declarations between the allowance of his entry, November 27, 1895, and the submission of final proof, Nov. 29, 1897, encourage or induce the townsite claimants to occupy or improve the lands within the claimed townsite settlement, nor did he acquiesce in such occupancy or improvement between the times named, Nov. 27, 1895, and Nov. 29, 1897.

Sixth. The entryman did not between Nov. 27, 1895, and Nov. 29th, 1897, enter into any contract with one Roberts, or any other person whereby White agreed upon obtaining title under his entry, to dispose of any of the land in controversy, for townsite purposes, or whereby White induced Roberts, or any other person to refrain from participation of the claims of the townsite people.

Seventh. There were within the claimed townsite settlement both on the Northern Pacific right of way and off of it and on the land in controversy at the time of allowance of White's entry November 27, 1895, forty five inhabitants and at the time of his submis-

254 sion of final proof, on November 29, 1897, there were forty nine.

The value of the improvements of the claimed townsite settlement both on and off of the right of way, was at the time of the allow-

ce of White's entry, valued at from $7,000 to $8,000 and was sub-
ntially the same at the time of White's submission of proof Nov.
1897.

As to the question of priority of settlement and also those pertain-
g to settlement on the Northern Pacific right of way have been
nsidered by the Department (28 L. D. 412 to 422) and as there
s been no evidence submitted at this hearing that has any material
aring on these points, therefore the only points to be passed on at
present time are those contained within the fifth and sixth issue
the contest, viz:

Fifth. Did White, by act of declarations between the allowance of
entry and the submission of final proof thereon, and if so, to what
ent, encourage or induce the townsite claimants to occupy or im-
ve lands within the claimed townsite settlement, and to what
ent, if any, did he acquiesce in such occupancy or improvement
ween the times named?

Sixth. Did White, between the date last named enter into any con-
ct in writing with one Roberts, or any other person, whereby
ite agreed, upon obtaining title under his entry, to dispose of
any of the lands in controversy for townsite purposes, or
whereby White induced Roberts, or any other persons to re-
frain from participation in the assertion of claim of the town-
people.

In these two issues the contestant failed in the proof in the testi-
ny submitted.

Wherefore and because of the aforesaid findings of fact, we recom-
nd that the protests be dismis-ed, and the final homestead entry
relieved of suspension and that the same be passed to patent.

LOUIS L. SHARP,
Special G. L. O. Agent, Acting Register.

concur in the foregoing conclusions and recommendations.

——— ———, *Receiver.*

PLAINTIFFS' EXHIBIT "D."

e United States of America to all to who- these presents shall
come, Greeting:

Homestead Certificate No. 417. Application 958.

Whereas, There has been deposited in the general land office of
United States, a Certificate of the Register of the land office at
ur d'Alene, Idaho, whereby it appears that, pursuant to the Act
Congress approved May 20th, 1862, "To secure Homesteads to
Actual Settlers on the Public Domain," and the acts supple-
mental thereto, the claim of John E. White has been estab-
lished and duly consummated, in conformity to law, for the
rthwest quarter of the Southwest quarter and the lots numbering
six and seven of Section two, in Township fifty-five north of

Range two east of Boise meridian in Idaho containing one hundred and twenty-eight acres and ninety-two hundredths of an acre according to the official plat of the survey of the land, returned to the general land office by the surveyor general:

Now know ye, That there is, therefore, granted by the United States unto the said John E. White the tract of land above described: to have and to hold the said tract of land, with the appurtenances thereof, unto the said John E. White and to his heirs and assigns forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing or other purposes, and right to ditch and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts, and also subject to the right of the proprietor of a vein or lode to extract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted, as provided by law. And there is reserved from the lands hereby granted, a right of way thereon for ditches and canals constructed by the authority of the United States.

In testimony whereof I, Theodore Roosevelt, President of
257 the United States of America, have caused these letters to be made Patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the fourteenth day of July, in the year of our Lord, one thousand nine hundred and three, and of the Independence of the United States the one hundred and twenty eight.

By the President:

T. ROOSEVELT,

[SEAL.] By T. M. McKEAN, *Secretary.*

C. M. BRUSH,

Recorder of the General Land Office.

Recorded Idaho Vol. 49 page 256.

Indorsed.

STATE OF IDAHO,
County of Kootenai, ss:

Filed for record at the request of John E. White, on the 23 day of July, 1903, at 9:25 o'clock a. m., and recorded in book 1 of Patents on page 401.

T. L. QUARLES,
County Recorder.
D. E. DANBY, *Deputy.*

PLAINTIFFS' EXHIBIT "E".

A. M.
G. W. B.
H. L. K.

UNITED STATES OF AMERICA:

DEPARTMENT OF THE INTERIOR,
258 WASHINGTON, D. C., *February* 18, 1904.

Pursuant to Section 882 of the Revised Statutes, I hereby certify that the annexed papers is a true copy of the original record in this Department.

In testimony whereof, I have hereunto subscribed my name and caused the seal of the Department of the Interior to be affixed, the day and year first above writen.

THOS. RYAN,
Acting Secretary of the Interior.
[SEAL.] J. I. P.

Vol. 25: No. 663. C. J. W.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, V. B. F. L. C.
W. V. D. *September* 2, 1899.

HENRY MELDER, as Trustee for Occupants of Townsite of Clark's Fork,
vs.
JOHN E. WHITE.

Petition for Review.

The Commissioner of the General Land Office.

SIR: On May 22, 1899, the Department considered on re-review the case of Henry Melder against John E. White, in which
259 said Melder, as probate judge, contested the homestead entry of said White for the benefit of certain persons who claimed to have made townsite settlement upon a part of the land covered by White's entry to-wit the N. W. ¼ of the S. W. ¼ of Sec. 2, T. 55 N. R. 2 E., Coeur d'Alene land district, Idaho, (28 L. D., 412.)

The effect of that review was to vacate the departmental decision then under review and reverse the decision of your office of February 6, 1897, which was favorable to the townsite claimants, and to hold the homestead entry of White intact.

The said Melder, acting in behalf of the townsite claimants, has filed a second petition for re-review of said case, alleging that errors of the law and fact were committed in the reviewing opinion.

In rendering the opinion complained of the evidence as summarized by the local office was adopted by the Department as substantially correct and as presenting fairly the material facts involved.

It is now insisted that no mention was made of certain facts which petitioner deems material, and amongst them is the fact that the houses originally occupied by Vinton was on the land in question and not on the railroad right of way; and the inference sought to be drawn is that Vinton was a prior settler to White. If this was true, one settler does not make a town. But it appears from the testimony of Whitcomb that Vinton moved away in the fall
260 of 1892, and Whitcomb claims to own the property on which Vinton once lived. It is also insisted that a house temporarily occupied by a man named Huston was probably on the quarter in dispute and not on the railroad right of way. Huston is shown to have been a single man and a mining prospector who spent his time chiefly in the woods and used this building for a time as a place for keeping mining stores and a shelter in when he came to Clark's Fork. He is not shown to have been the owner. He was out of the county long before Melder filed his contest and was never in any legal sense a townsite settler.

It is further insisted that the survey and plat which Nagle had made in the year 1889 for the purpose of leasing and settling town lots from his claim shows that the business houses found to be on the railroad right of way were upon lots which according to this survey included not only the right of way, but extended about fifteen feet upon the quarter in dispute. Melder was himself a witness at the hearing and he testified (page thirty-eigth of the record) that if the right of way extended two hundred feet, then all of the business houses mentioned by him were upon the railroad right of way. Nagle claimed to have made a homestead settlement, and on his own authority surveyed a part of the land so settled upon into blocks and lots and undertook to dispose of town lots for his own profit without any authority of law whatever.

Neither the survey, nor sales by him could be of any legal
261 force or effect. That the business houses referred to were upon the railroad right of way is evidenced by the further fact that they were moved off the right of way when the railroad demanded it, except the buildings of Roberts, which was leased from the railroad.

It does not appear that the facts are unfairly presented in the reports of the local office or that any fact has been omitted which would require a different conclusion to be reached in the case. It is insisted, however, that fractional parts of the lots upon which Roberts and Nagel built their business houses extended to and upon the land involved and were used by them for trade and business, and that the use made of them was the planting of the same in shrubbery and fruit trees.

White has filed two affidavits of George Roberts, one of the townsite claimants, from which several facts appear which are fatal to the contentions of the townsite claimants. It appears that as early at least as January, 1891, Whitcomb knew the extent of the right of way of the railroad, and that it was generally known by the people of Clark's Fork. Roberts also states that as to the small fraction

of the public land finally enclosed by him in connection with his business house, which erected on the right of way of the railroad, and on which at the date of the hearing there was some shrubbery and fruit trees planted, that it was no so enclosed or used
262 until the year 1894, long after White's settlement; and the same is true of other lots in question.

White the criticisms made upon the facts as reported by the local officers have some appearance of plausibility, they are essentially without merit and requires no further action upon the part of the Department.

So far as the law in the case is concerned, the reason presented for further consideration is not a sufficient one.

It is suggested that, if it be conceded that the railroad company took a fee in its right of way, White's settlement rights arising from his settlement on the south side of the right of way stopped short of the southern boundary of the right of way and could not extend beyond it, and that this phase of the case was not considered by the Department. The reasoning is specious, since the question specifically decided by the department necessarily involved the consideration of the view, and impliedly, if not specifically it was rejected.

In view of the fact that the case was the subject of protracted consideration between the final decision was rendered, and that counsel for both parties filed voluminous briefs, which were considered, it is not deemed necessary to allow further opportunity for discussion, since no new issue is presented, and the petition for re-hearing is denied. It has been supplemented, however, by a motion for
263 further hearing, which appears to have been presented as an alternative motion to be relied upon only in the event the petition for re-hearing was not granted. This motion asked for further hearing and is predicated upon affidavits filed by Moses Whitcomb, Reuben Johnson, Jason Edwards, and Mrs. Jason Edwards.

It appears that in the interim between the promulgation of the decision complained of the filing of the petition for review, the defendant, White, proceeded with his final proof, upon which final certificate issued from the local office.

A motion has also been filed by counsel for defendant to dismiss the motion for further hearing.

In the affidavit filed by Whitcomb it is alleged that White is holding the whole legal subdivision in question for speculative purposes and not for *bona fide* homestead purposes, to be used by himself for townsite purposes as soon as he can obtain title thereto under the homestead entry.

Reuben Johnson makes affidavit to the effect that in May, 1897, he contemplated building a house on the south side of the railroad track on the land in dispute, believing it to be a part of the townsite, when said White approached him and advised against it, saying he intended to use that side of the track for pasturage, but if he (Johnson) desired could take lots on the north side, and if he (White) was able to prove up, he would give him a good title to the lots, as he in-

tended to make a townsite of it and sell off the lots, and that,
264 relying upon this statement he (Johnson) cleared and fenced seven lots on the north side of the railroad and built a small house and a barn at a cost of $325.00.

Jason Edwards and his wife make substantially the same statements as to what White said to them in reference to improving the lots on which they reside.

It is to be noted that these affidavits, intended to be corroborative of White's charges, are only corroborative as to that part of the entry north of the right of way.

The motion and affidavits on which it is based has no proper place in the present record, since they state a new cause for complaint separate and distinct from the one on which the hearing was had before the local office, and upon which the record was made up. The Department has repeatedly held the new causes of complaint can not be engrafted upon cases pending before the department on appeal, but in such cases your office is not precluded from directing an inquiry in the nature of a new contest. See Lark *v.* Livingstone, 26 L. D., 163, and case there cited.

For these reasons, the application for re-hearing is denied.

The papers in the case are herewith returned.

Very respectfully,

E. A. HITCHCOCK, *Secretary.*

265 PLAINTIFF'S EXHIBIT "F."

A. M.
G. W. B.
H. L. K.

UNITED STATES OF AMERICA:

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *February* 18, 1904.

Pursuant to Section 882 of the Revised Statutes, I hereby certify that the annexed paper is a true copy of the original of record in this Department.

In testimony whereof, I have hereunto subscribed my name and caused the seal of the Department of the Interior to be affixed, the day and year first above written.

[SEAL.]

THOS. RYAN,
Acting Secretary of the Interior.

A. S. T. J. R. W.

W. V. D.

DEPARTMENT OF THE INTERIOR, S. V. P.
WASHINGTON, *Dec.* 20, 1901.

HENRY MELDER
vs.
JOHN E. WHITE.

The Commissioner of the General Land Office.

SIR: This is a contest between John E. White, who made
266 homestead entry November 27, 1895 for the N. ½ of S. W. ¼ and lots 5 and 6, Sec. 2, T. 55 N., R. 2 E., Cœur d'Alene land district, Idaho, and certain named townsite settlers upon a portion of the N. W. ¼ of the S. W. ¼ of said section. The history of the contest appears in departmental decision of May 22, 1899 (28 L. D. 412.) The matter is again before the department on the appeal of the townsite claimants from your office decision of March 28, 1901, which declined to order a further hearing upon the applications and affidavits of the townsite claimants making divers charges against the entry, some of which are intended to question the good faith and validity of the entry in its inception, and, others of which are intended to question it by reason of matter occurring subsequently to the making of the entry, such as the formation on the part of the entryman of a purpose, while requiring title under the homestead law, to dispose of part of the land for townsite purposes, and such as acts and declarations of the entryman calculated to induce townsite claimants to occupy and improve a portion of the land with a view to ultimately attaining title through the entryman, White the entryman, through his counsel, has had access to the applications of the townsite claimants for a further hearing and the affidavits filed in support thereof, and has filed other affidavits in opposition thereto, as well as printed brief. Upon careful consideration of these conflicting affidavits and upon a reconsideration of the entire case it is directed that a further hearing be forthwith ordered herein,
267 to be had and concluded with as little delay as may be consistent with the due protection of the rights of all concerned, which further hearing shall include and be limited to the following matters:

First. What portion of the land in controversy was included within the claimed townsite settlement at the time of the allowance of White's entry?

Second. What was the character of the occupancy and improvements of the townsite claimants at the time of the allowance of White's entry?

Third. What portion of the land in controversy was included in the claimed townsite settlement at the time of the submission of final proof upon White's entry?

Fourth. What was the character of the occupancy and improvements of the townsite claimants at the time of the submission of final proof upon White's entry?

Fifth. Did White, by act or declaration, between the allowance of his entry and the submission of final proof thereon, and if so to what extent, encourage or induce the townsite claimants to occupy or improve lands within the claimed townsite settlement, and to what extent, if any, did he acquiesce in such occupancy or improvements between the times named?

Sixth. Did White, between the dates last named, enter into any contract in writing with one Roberts, or any other person,
268 whereby White agreed, upon obtaining title under his entry, to dispose of any of the lands in controversy for townsite purposes or whereby White induced Roberts, or any other person, to refrain from participation in the assertion of the claim of the townsite people?

Seventh. What was the number of the inhabitants and the value of the improvements in the townsite settlement at the time of the allowance of White's entry and at the time of his submission of final proof thereon respectively?

The parties should be especially cautioned that none but competent evidence revelant to the matter under consideration will be accepted. The burden of proof will be upon the townsite claimants and rule respecting the apportionment and payment of costs which would be applicable if this were an original contest, will be applicable to this hearing.

The particular ground occupied by the claimed townsite settlers at the time of the allowance of White's entry and at the time of the submission of final proof thereon respectively, should be so described, and its description so tied to establish Government corners or monuments and the acreage thereof so computed, that the department could, if it seemed to be just in the premises, segregate the same from White's entry.

Upon the conclusion of the further hearing hereby ordered, the local officers will, from the evidence then submitted and the
269 evidence submitted at the hearing heretofore had, make such finding of facts and recommendation in the premises as they may believe to be right, and according to the law, and they will afford the usual opportunity to appeal. In the mean time, the former departmental decision herein are withdrawn and further action upon White's final homestead entry will be suspended.

Very Respectfully,

E. A. HITCHCOCK, *Secretary.*

PLAINTIFFS' EXHIBIT "G"

In the District Court of the First Judicial District of the State of Idaho in and for the County of Kootenai.

JOHN E. WHITE and ROBERTA B. WHITE, Plaintiffs,
vs.
H. D. JOHNSON, F. S. LANGLEY, M. W. CALDWELL and JAMES CHANNING, Defendants.

Amended Complaint.

Comes now the plaintiffs above named, and for amended complaint against defendants above named, allege:

I.

That at all the times and dates herein mentioned, plaintiffs
270 were and are, husband and wife.

II.

That at all times and dates hereinafter mentioned, plaintiffs were, and still are, the owners in fee of the property herein after mentioned and described.

III.

That at the time hereinafter mentioned the plaintiffs were in actual peaceable and undisturbed possession of certain realty in the place and vicinity usually described as "Clarks Fork", in Kootenai County, State of Idaho, described as follows: That particular piece or plat of ground lying west of and immediately adjoining the premises known as the Thibadeau residence and used prior to the 4th day of December, 1899, as a garden by Mrs. M. D. Thibadeau, and said premises being situated on the North side of the track of the Northern Pacific Railway, in the northwest quarter of the southwest quarter of section two, Township fifty-five, north of range two, E. B. M.

IV.

That on the 4th day of December, 1899, the plaintiffs and defendant H. D. Johnson mutually entered into a lease of said premises a copy of which said lease, marked "Exhibit A", is attached to this amended complaint, and is hereby made a part of the same.

V.

That subsequently and by virtue of said lease the said
271 defendant and Lessee, Johnston, entered into the actual and peaceable possession of said premises, and that on or about the 6th day of May, 1902, he sub-let the same *the* defendant F. S. Lang-

ley, against the covenant in said lease, and without the consent or knowledge of plaintiffs or either of them.

VI.

That thereupon the said Langley entered into, and at the time of the commencement of this action and filing of the original complaint herein remained in the actual possession of said tract of land.

VII.

That upon the breach of said covenant of said lease the plaintiffs, desirous of re-entering upon said premises and plat of ground, demanded possession of the same from said Langley, giving to him written notice to quit and surrender possession of said premises, which notice was given for more than three days, and which notice required the surrender and delivery of possession of said premises and property to the plaintiffs herein and was personally served upon said Langley, but the said Langley refused and has at all times refused to comply with the demands of plaintiffs and said notice and has declined and refused to surrender the possession of said premises and property to plaintiffs.

VIII.

That by reason of the refusal of said Langley to surrender
272 the possession of said premises and his intention of the same, the plaintiffs have suffered damages to the extent of five hundred dollars ($500.00).

IX.

That after said notice had been served upon said Langley and with full knowledge and notice of the execution and delivery of the lease hereinbefore mentioned and of the violation of said lease, and with full knowledge and notice of the fact that said Langley had no title whatever, M. W. Caldwell, claimed to have purchased the interest of the said Langley in and to the said lease of the premises and property aforesaid and the said Caldwell knew that suit was pending, at the time he claimed to have purchased the interest of the said Langley in said lease, between the plaintiffs herein as plaintiffs and H. D. Johnson and F. S. Langley as defendant, to-wit: this action in which judgment has heretofore been rendered, both in the probate court and in the district court, upon appeal, and had full knowledge and notice of the fact that said Langley had no right, title or interest except in said lease.

X.

That defendant James Channing, within a short time before the filing of this amended complaint, claims to have purchased from said Caldwell the right, title and interest, if any, which the said Caldwell had, and, at the time of the claim was purchased James

Channing had full knowledge and notice that the only inter-
273 est the said Caldwell had was such as he procured from defendant F. S. Langley, and had full knowledge and notice of all of the facts herein alleged to have been within the knowledge and notice of defendant Caldwell, and knew and had full knowledge and notice that the plaintiffs have title in fee simple to the property and that the only interest that said Caldwell, Langley or Johnson, or any other party other than plaintiffs had in and to the said premises hereinbefore described were such as were acquired under said lease, and that the terms of said lease had been violated and that the defendant, H. D. Johnson, had wrongfully, unlawfully attempted to sublet the same as hereinbefore alleged and set forth, and the defendants or either of them have no greater or different right from that of defendant H. D. Johnson, and that the defendant other that H. D. Johnson have, in fact, no right, title or interest herein for the reason that whatever interest they acquire or attempted to acquire was acquired or attempted to be acquired, was in violation and contrary to the terms of said lease, and that the same had been terminated as hereinbefore set forth, and that defendants other than H. D. Johnson had been, and now are, wrongfully and unlawfully occupying said premises and property and the whole and every part thereof, and have wrongfully and unlawfully occupied the same ever since the date they attem-ted to acquire and interest therein.

XI.

That the notice hereinbefore mentioned required the per-
274 formance of the condition and covenant of said lease and was served upon the sub-tenant in actual occupation of the premises, requiring the performance and observance of the condition and covenant of said lease not to sublet the same and that upon failure to observe and comply with said covenant and condition and possession of the said premises and property be surrendered to plaintiffs.

XII

That under and by virtue of said lease, the sum of seventy dollars ($70.00) was paid and seventy dollars ($70.00) remains unpaid; and in addition to the said $140.00, the rent to be paid consists of buildings and improvements erected or to be erected upon said premises by the said lessees or by any other persons occupying the said premises or making improvements in pursuance of said lease.

Wherefore, Plaintiffs pray judgment against defendant for treble the amount of judgment as aforesaid; that the said lease be declared forfeited and cancelled; that the attempted subleasing and subletting be declared null and void; that the defendants and each of them be held to be unlawfully and wrongfully occupying the premises of the plaintiffs, and that there be made to them, the plaintiffs restitution of said premises and property and that they be put into possession thereof and for such other and further relief as may be proper in the premises.

STEPHENS AND BUNN,
Attorneys for Plaintiffs.

STATE OF IDAHO,
County of Kootenai, ss:

JOHN E. WHITE, being first duly sworn upon oath, deposes and says:

That he is one of the Plaintiffs in the above and foregoing entitled action; that he has read the foregoing amended complaint, knows the contents thereof, and that the same is true of his own knowledge except as to the matter and things which are therein stated to be alleged upon information and belief and to those matters and things he believed it to be true.

JOHN E. WHITE.

Subscribed and sworn to before me this 3rd day of October 1903.

[NOTARY SEAL.] IGNATZ WEIL,
Notary Public in and for Kootenai County Residing at Sandpoint.

EXHIBIT A.

This indenture, made this fourth day of December, 1899, by and between John E. White, lessor, and H. D. Johnson, lessee, both of Clark's Fork, Kootenai County, Idaho.

Witnesseth: That the said lessor, for and in consideration of the sum of one hundred and forty dollars, the receipt of seventy dollars which is hereby acknowledged and for the further consideration of all the buildings and other improvements that
276 the said lessee shall at any time during the continuance of this lease place or cause to be placed upon the within described ground, does by these presents lease and demise upon the said lessee that certain tract and parcel of land lying, being and situated in the town of Clark's Fork, Kootenai County, State of Idaho, on the north side of the Northern Pacific Railway track in the N. W. ¼ of the S. W. ¼ Sec. 2, Tp. 55 N., R. 2 E. B. M., and enclosed and known as Thibadeau residence and former post office, and also the plat of ground lying immediately west thereof and adjoining the same, being that tilled as a garden by Mrs. M. D. Thibadeau. To have and to hold for the period of two years from and after the date hereof. And the said lessee hereby agrees and binds himself to pay the said lessor the remaining seventy dollars on the 4th day of December, 1902, and it is agreed that the said lessor may on due notice given enter the premises for the purpose of making any needful improvements that may in his opinion become necessary. And said lessee further binds himself not to sublet said premises or any part thereof, and that he will keep the same in good repair, and that at the expiration of the said term of this lease to peacefully surrender his possessions thereof to said lessor.

Signed in duplicate the day and year first above written.

JOHN E. WHITE. [SEAL.]
ROBERTA B. WHITE. [SEAL.]
H. D. JOHNSON. [SEAL.]

277 (Endorsed:) "Filed Oct. 3, 1903, T. L. Quarles, Clerk. By Chas. A. Ervin Deputy."

In the District Court of the First Judicial District of the State of Idaho in and for the County of Kootenai.

JOHN E. WHITE and ROBERTA B. WHITE, Plaintiffs,
vs.
H. D. JOHNSON, F. S. LANGLEY, M. W. CALDWELL, and JAMES CHANNING, Defendants.

Findings of Fact and Conclusions of Law.

The above entitled action came on regularly for hearing and trial on November 2, 1903, plaintiffs and defendants appearing by their respective counsel except Defendant H. D. Johnston who has been regularly served with process and has failed to appear herein after service of complaint as authorized and required by law and such failure and default of said defendant H. D. Johnston has been and is hereby entered and the residue of the parties defendant as well as the plaintiffs announced ready for trial and in open court waived trial by jury and stipulated that this action be heard and tried by the court sitting without a jury; the plaintiffs and defendants respectively offered evidence on November 2, 1903, and the further hearing and trial of this cause was adjourned until November 3,
278 1903, and after hearing and taking additional evidence the court finds from the evidence the following facts, to-wit:

Findings of Fact.

1. That at all the times and dates herein mentioned, plaintiffs were and are husband and wife.

2. That at all the times and dates in the complaint or plaintiffs mentioned plaintiffs were, and still are the owners in fee of the property hereinafter mentioned and described.

3. That at the time mentioned in the complaint of plaintiffs they were in actual, peaceable and undisturbed possession of certain realty in the place and vicinity usually described as "Clarks Fork," in Kootenai County, State of Idaho, described as follows: That particular parcel or platted ground lying west of and immediately adjoining the premises known as the Thibadeau residence and used prior to the 4th of December, 1901, as a garden by Mrs. M. D. Thibadeau, the said premises being situated on the north side of the track of the Northern Pacific railway, in the Northwest quarter of the Southwest quarter of section two, township fifty-five, north range 2, E. B. M.

4. That on the 4th day of December, 1901, the plaintiffs and defendant H. D. Johnston mutually entered into a lease of said premises, a copy of which said lease marked "Exhibit A," is attached to the amended complaint in this action, and which is in words and figures as follows, to-wit: "This Indenture, made this
279 4th day of December, 1901, by and between John E. White, lessor, and H. D. Johnston, lessee, both of Clarks Fork, Kootenai county, Idaho. Witnesseth, that the said lessor, for and in con-

sideration of the sum of one hundred and forty dollars, the receipt of seventy dollars whereof is hereby acknowledged, and for the further consideration of all the buildings and other improvements that the said lessee shall at any time during the continuance of this lease place or cause to be placed upon the within described ground, does by these presents lease and demise upon the said lessee that certain tract and parcel of land lying, being and situated in the town of Clarks Fork, Kootenai county, and state of Idaho, on the north side of the Northern Pacific Railway track in the N. W. ¼ of the S. W. ¼, Sec. 2, Tp. 55 N., R. 2. E. B. M. and enclosed and known as the Thibadeau residence and former post office, and also the plat of ground lying immediately west thereof and adjoining the same, being that tilled as a garden by Mrs. M. D. Thibadeau to have and hold for the period of two years from and after the date hereof. And the said lessee hereby agrees and binds himself to pay to the said lessor the remaining seventy dollars on the 4th day of December 1902. And it is agreed that the said lessor may on due notice given enter the premises for the purpose of making any needful improvements that may in his opinion become necessary. And said lessee further binds himself not to sublet said premises or any
280 part thereof, and that he will keep the same in good repair, and that at the expiration of said term of this lease to peacefully surrender his possession thereof to the said lessor.

Signed in duplicate the day and year first above written.

JOHN E. WHITE. [SEAL.]
ROBERTA B. WHITE. [SEAL.]

H. D. JOHNSTON. [SEAL.]

5. That subsequently and by virtue of said lease the said defendant and lessee, Johnston, entered into the actual and peaceable possession of said premises, and that on about the 15th day of May, 1902, he sublet the same to defendant F. S. Langley, against the covenant of said lease, and without the consent or knowledge of plaintiffs or either of them.

6. That thereupon the said F. S. Langley entered into, and at the time of the commencement of this action and filing of the original complaint herein remained in, the actual possession of said tract of land.

7. That upon the breach of said covenant of said lease the plaintiffs, desirous of reentering the said premises and plat of ground, demanded possession of the said premises and which notice was given for more than three days, and which notice was required the surrender and delivery and possession of said premises and property to the plaintiffs herein and was personally served upon said Langley, but the said Langley refused and has at all times refused to
281 comply with the demands of plaintiffs and said notices and has declined and refused to surrender the possession of said premises and property to plaintiffs.

8. That by the reason of the refusal of the said Langley to surrender the possession of the said premises and his retention of the

same the plaintiffs have suffered damages to the extent of one hundred dollars ($100).

9. That after said notice had been served upon said Langley and with full knowledge and notice of the execution and delivery of the lease hereinbefore mentioned and of the violation of said lease, and with full knowledge and notice of the fact that said Langley had no title whatever, M. W. Caldwell, claims to have purchased the interest of the said Langley, in and to the said lease of the premises and property aforesaid, and the said Caldwell knew that suit was pending, at the time he claims to have purchased the interest of the said Langley in said lease, between the plaintiffs herein as plaintiffs and H. D. Johnson and F. S. Langley as Defendants, to-wit, this action, in which judgment has heretofore been rendered, both in the probate court and in the district court, upon appeal, and has full knowledge and notice of the fact that said Langley had no right, title or interest, except in said lease.

10. That Defendant James Channing, within a short time before the filing of this amended complaint, claims to have pur-
282 chased from said Caldwell, the title right and interest if any which the said Caldwell had and at the time the claim was purchased the defendant James Channing had full knowledge and notice that the only interest the said Caldwell had such as he procured from Defendant F. S. Langley and had full knowledge and notice of all the facts herein found to have been within the knowledge and notice of defendent Caldwell, and knew and had full knowledge and notice that plaintiffs have title in fee simple to the property and that the only int-rest that said Caldwell, Langley or Johnston or any other party other than plaintiffs had in and to the said premises hereinbefore described were such as were acquired under said lease, and that the terms of said lease had been violated and that the defendant H. D. Johnston had wrongfully and unlawfully attempted to sublet the same as hereinbefore alleged and set forth and the defendant or either of them had no greater or different right from that of defendant H. D. Johnston, and that the defendant other than H. D. Johnston have in fact, no right, title or interest herein for the reason that whatever they acquire or attempt to acquire was acquired or attempted to be acquired was in violation and contrary to the terms of said lease, and that the same has been terminated as hereinbefore set forth, and that defendants other than H. D. Johnson had been, and now are, wrongfully and unlawfully occupying said premises and property and the whole and every
283 part thereof, and wrongfully and unlawfully occupied the same ever since the date they attempted to acquire an interest therein.

11. That the notices hereinbefore mentioned required the performance of the condition and covenant of said lease and was served upon the sub-tenant in actual occupation of the premises requiring the performance and observation of the condition and covenant of said lease not to sublet the same and that upon failure to observe and comply with said covenant and condition that possession of the said premises and property to be surrendered to plaintiffs.

12. That by under and virtue of said lease, the sum of seventy dollars ($70) was paid and seventy ($70) remains unpaid; and in addition to one hundred and forty dollars ($140) the rent to be paid consists of buildings and improvements erected or to be erected upon said premises by the said lessee or by any other person occupying said premises or making improvements in pursuance of said lease.

13. That the damage to plaintiffs is the residue of the rent unpaid under the said lease, to-wit: seventy (70) dollars with interest thereon from December 4th, 1902, and other damages as well; that the actual amount of rent due at this time in money is seventy four and 50/100 ($74.50) dollars.

14. That defendant H. D. Johnson at the time of service upon defendant F. S. Langley, had removed from the town of Clarks
284 Fork, Idaho, and his residence or whereabouts were not known to the plaintiffs or either of them, and plaintiffs were unable to serve upon defendant H. D. Johnston the notice served upon F. S. Langley.

Conclusions of Law.

The court finds as conclusions of law:

That the plaintiffs are entitled to judgment as prayed for in their amended complaint, for the restitution of the premises therein described; that the defendants and each of them have failed to perform the conditions and covenants of the lease from plaintiffs to defendant H. D. Johnston; that the notices of termination of lease and to quit and surrender possession in all respects complies with the requirements of sub-division- 3 and 4 of section 5093 of the revised statutes of 1887 and of section 5094 of said Statutes; that the notice was served as authorized and required by law and is good and sufficient as a matter of law and that the rest of seventy ($70) dollars due December 4th, 1902, has never been paid, and that the same and the whole and every part thereof is now due and has been due since December 4th, 1902, with interest thereon at the rate of seven (7) per cent. per annum.

That plaintiffs have been damaged to the extent of the rent unpaid, and more; that they have been put to a great cost and expense in this suit, and that plaintiffs are entitled to recover their
285 costs herein, and are entitled to judgment for treble the amount of damages they have sustained, which damages including the disbursements of plaintiffs amount to — dollars; that defendants H. D. Johnson, Langley and Caldwell are personally liable for the whole of said judgment, for treble demands and costs herein, and that defendant James Channing is personally liable for the portion of the damages which have been suffered since he went into possession of said premises, to wit: from the 11th day of August, 1903; that in addition to recover treble the amount thereof, the plaintiffs are entitled to the improvements on the premises involved in this action.

Done in open court this 3rd day of November, A. D. 1903.

R. T. MORGAN,
District Judge.

(Endorsed:) "Filed Nov. 6th, 1903. T. L. Quarles, Clerk Dist. Court. By George W. Flemming, Deputy."

In the District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai.

JOHN E. WHITE and ROBERTA B. WHITE, Plaintiffs,
vs.
H. D. JOHNSON, F. S. LANGLEY, M. W. CALDWELL, and JAMES CHANNING, Defendants.

Judgment and Decree.

286 This cause having come on regularly for hearing and trial on November 2, 1903, plaintiffs and defendants appearing by their respective counsel, except defendant H. D. Johnston, who had been duly and regularly served with summons and complaint herein, but has failed to appear or answer herein, and whose default for not appearing or not answering has been regularly entered. And the evidence of plaintiffs and defendants having all been introduced and the cause having been submitted to the court sitting without a jury, upon stipulation of the parties made in open court, and the court having found and decided the issues in this cause in favor of the plaintiffs, and having made and filed herein findings of fact and conclusions of law.

Wherefore, It is ordered, adjudged and decreed by the court that the plaintiffs have and recover of and from the defendants and each of them the possession of the premises described in the amended complaint, to-wit: the following described property: That particular parcel or plat of ground lying west of and immediately adjoining the premises known as the Thibadeau residence and used prior to the 4th day of December, 1901, as a garden by Mrs. M. D. Thibadeau, the said premises being situated on the north side of the track of the Northern Pacific railway, in the northwest quarter of the southwest quarter of section two, township fifty-five north, range two east, Boise Meridian, in Kootenai county, state of Idaho; and that plaintiffs have restitution thereof from the defendants and each

287 of them.

It is further ordered, adjudged and decreed that the defendants have failed to perform the conditions and covenants of the lease from plaintiffs and defendants H. D. Johnston, in evidence of this action, and under which they hold; and that since the commencement of this action the balance of the rent to be paid under said lease has become due and payable, and the same has not been paid, nor has any part thereof been paid; and that by reason of the facts found herein in the conclusions of law made by the court and the proceeding and subsequent provisions of this judgment and decree, it is ordered and adjudged and decreed and hereby declaimed that the said lease be, and the same is hereby forfeited, terminated and at an end.

It is further ordered, adjudged and decreed that under the law

as well as under the lease in evidence in this action, plaintiffs are entitled to have and retain all of the improvements upon the above mentioned and described property, and that the said improvements be and are the plaintiffs' herein.

It is further ordered, adjudged and decreed that the plaintiffs have and recover of and from defendants H. D. Johnston and F. S. Langley and M. W. Caldwell and each of them the sum of two hundred and twenty-three and 50/100 dollars, being triple or three times the amount of damages assessed herein and found to be due from the said defendants to plaintiffs.

288 It is further ordered, adjudged and decreed that plaintiffs have and recover of and from the defendants and each of them the costs and disbursements of plaintiffs herein, taxed at fifty-nine and 25/100 dollars. It is further ordered that execution be issued herein and hereon, appropriate for the restoration and restitution of the premises above described to the plaintiffs herein, and for the enforcement of the personal judgments against the various defendants hereinbefore specified.

Done in open court, this 3rd day of November, 1903.

R. T. MORGAN,
District Judge.

Recorded in book 3 of judgments on page 33 on the 4th day of November, 1903.

[Endorsed:] "Filed November 4th, 1903, T. L. Quarles, Clerk Dist. Court. By Geo. W. Flemming, Deputy."

In the Supreme Court of the State of Idaho, October Term, A. D. 1904.

JOHN E. WHITE ET AL., Plaintiffs and Respondents,
vs.
H. D. JOHNSON ET AL., Defendants and Appellants.

On an Appeal from the District Court of the First Judicial District in and for Kootenai County.

This cause having been heretofore heard, submitted and taken under advisement by the court, and the court having fully
289 considered the same, now on this day the cause was again called, and the decision of the court is delivered by Chief Justice Sullivan, to the effect that the judgment of the court below be affirmed.

It is therefore, considered, adjudged and decreed by the court, that the judgment of the district court of the first judicial district, in and for the county of Kootenai, in the above entitled cause, be and the same hereby is affirmed, costs are awarded to the respondents.

I, Sol Hasbrouck, Clerk of the Supreme Court of the state of Idaho, do hereby certify that the foregoing is a true copy of the original judgment entered in the above entitled cause, on the 31st

day of December, A. D. 1904, and now remaining of record in my office.

Witness my hand and the seal of the court, affixed at my office, this 31st day of Dec., A. D. 1904.

[SUPREME COURT SEAL.]

Jan. 21. SOL. HASBROUCK, *Clerk.*

(Endorsed:) "Filed, Jan. 23rd, 1905. T. L. Quarles, Clerk."

STATE OF IDAHO,
County of Kootenai, ss:

I, T. L. Quarles, Clerk of the District Court of the First Judicial District of the State of Idaho, in and for the county of Kootenai, do hereby certify that the foregoing is a full, true and cor-
290 rect copy of the original Amended Complaint, Findings of Fact and Conclusions of Law, Judgment and Decree, and Remittitur from the Supreme Court of the State of Idaho, as the same appears on file in my office in the above entitled action.

Witness my hand and the seal of the above entitled court this, the 10th day of July, A. D. 1905.

T. L. QUARLES,
Clerk of Dist. Court.

PLAINTIFFS' EXHIBIT "H".

"G" M. L. 147146. I. R. C.
D. W.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Feb.* 13, 1904.

I, J. H. Fimpel, Acting Commissioner of the General Land Office, do hereby certify that the annexed transcript of the affidavit of Gordon Daugharty, dated ..... day of October, 1899, and filed with brief and affidavit for try by George H. Lamar, as Exhibit No. 9, in the case of Henry elder, probate judge, as trustee for Clarks Fork townsite, Kootenai county, Idaho, against John E. White, of record in this office, involving the northwest quarter of the southwest quarter of section two in township fifty-five north, of range two east of the Boise principal meridian is a true and literal exemplification of said affidavit.

291 In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed at the city of Washington, on the day and year above written.

[SEAL.] J. H. FIMPLE,
Acting Commissioner of the General Land Office.

Affidavit of Gordon Daugharty.

Ex. No. 9.

STATE OF IDAHO,
County of Kootenai, ss:

Gordon Dougharty being first duly sworn says. That he has been a resident of Clarks Fork, Idaho, for a number of years and that in April, 1897, he purchased of George Roberts his hotel and saloon and general merchandise business and buildings in said Clarks Fork. That at no time during the deal with said George Roberts or before or afterwards was any hint or mention made by Roberts of any contract he (Roberts) had with John E. White relative to any agreement or promise the said White had made him (Roberts) respecting any portion of the homestead claim of White. That his deal with Roberts was for cash only and a clear understanding that the land the buildings were situated on belonged to the Northern Pacific Railway company, for which George Roberts held a lease and transferred to him.

G. DOUGHARTY.

Subscribed and sworn to before me this day of October,
292 1899.

[SEAL.] M D. THIBADEAU,
Notary Public.

Indorsed.

"We hereby accept service of the within this 14th day of December A. D. 1900, but protest against the filing hereof at this stage.

COPP & LUCKETT,
Attorneys for Plaintiff."

PLAINTIFFS' EXHIBIT "I."

"G" M. L. 147146 I. R. C.

D. W. DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Feb.* 13, 1904.

I, J. H. Fimble, acting commissioner of the general land office, do hereby certify that the annexed transcript of the affidavits of Moses P. Whitcomb, Bert Haberman, John S. Foreman, John G. Nagel, John B. Whitcomb, Andrew Hasselroth, Walter S. Flemming, and Carpenter Wilson, executed in June, 1899, and filed in the Department of the Interior on July 18, 1899, by E. S. Mussey as counsel for the townsite of Clarks Fork, Kootenai County, Idaho, with his brief for said townsite, in the case of Henry Meloer, trustee for said townsite, against John E. White, now of record in this office,

DARK PAGE BLEEDTH

involving the northwest quarter of the southwest quarter of section two in township fifty five north, of range two east of
293 the Boise principal meridian, is a true and literal exemplification of said affidavits.

In testimony whereof I have hereunto subscribed my name, and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.]

J. H. FIMPLE,
Acting Commissioner of the General Land Office.

CLARKS FORK, KOOTENAI CO., IDAHO,
June 21st, A. D. 1899.

Moses P. Whitcomb being first duly sworn deposes and says: That early in the spring of 1891 he built a dwelling house on the south side of the railroad track in the town of Clarks Fork, Kootenai County, State of Idaho, that cost him $100.00 and that he had land cleared and fenced and put into garden the same spring that his house was built off the railroad right of way, and that he has since that time added to and improved his house and grounds by clearing and putting out an orchard of something like 100 fruit trees until at the present time he has expended over $1000 on his home, that he has been engaged in the mercantile business in Clarks Fork since the fall of 1891, and that in the spring of 1895, Whitcomb Bros. & Nagel built a new store building on the north side of the railroad track and back off the company's right of way that cost them about $1500, and that he is one of the present firm of Whitcomb
294 Bros., who do a general mercantile business at Clarks Fork at the present time, and that his dwelling house and store are on the 40 acres in contest for townsite and that to his certain knowledge there is at the present time eighteen families besides White living upon the townsite, and that a number of them have put all they could raise into their homes thinking they were perfectly safe in doing so as the townsite had won all the decisions in the land office, and that White is not dependent upon his homestead for a living as he is at present and has been for years past depot agent for the Northern Pacific Railroad Co. at a good salary, and that White did contract with the Northern Pacific Railroad company in 1896 for the purchase of something over 300 acres of land adjoining the town of Clarks Fork, and that he still holds this land as he is cutting and removing the timber at the present time.

M. P. WHITCOMB.

Subscribed and sworn to before me this 21st day of June A. D., 1899.

[SEAL.]

M. D. THIBADEAU,
Notary Public.

CLARKS FORK, KOOTENAI COUNTY, IDAHO,
June 22, 1899.

Affidavit of Bert Haberman who upon oath deposes and says that in view of the favorable decisions of the Clarks Fork townsite, both

of the Hon. Commissioner of the Gen. Land Office and the Hon. Secretary of the Interior, he felt perfectly safe to make sub-
295 stantial improvements on the said townsite. That accordingly during the fall of 1898 he began with the assistance of 2 of his brothers to clear 5 fractional lots on the north side of the R. R. track and to erect thereon a one story frame dwelling consisting of a main building 14x20 and a wing 14x16 costing $150.00. That during the past spring they have plowed nearly all of the ground embraced in said lots not occupied by the building and planted it with potatoes and other vegetables and enclosed the lots with a substantial board and picket fence. That their sole purpose in erecting said building and making said other improvements was to establish and make a home for themselves.

BERT HABERMAN.

Subscribed and sworn to before me this 21 day of June 1899.

[SEAL.] M. D. THIBADEAU,
Notary Public.

CLARK'S FORK, KOOTENAI COUNTY, IDAHO,
June 22nd, 1899.

Affidavit of John S. Forman who upon oath deposes and says that he is engaged in the hotel business in the town of Clarks Fork. That his place of business consisting of a 2 story frame building 20x40 feet, and a 2 story wing 20x30 feet, attached thereto is situated on 2 lots of the townsite Clarks Fork north of the R. R. track.
296 That the main building was placed on its present location in the summer of 1894. That the wing attached thereto was placed on its present location in the summer of 1896. That he has under fence and cultivation as a family garden 2 adjoining lots. That he values the buildings and other improvements on said lots at $2000.00. That he is a man with family and well advanced in years. That on account of the favorable decision both by Hon. Commissioner of the Gen. Land Office and the Hon. Secretary of the Interior in favor of the townsite he felt safe and justified to make valuable improvements on his property during the past 2 years. That his entire possessions are represented in said property. That J. E. White has not the slightest improvements on that portion of the townsite situated on the north side of the R. R. track. That prior to the filing of his homestead entry in Nov. 1895, J. E. White's claim and improvements were confined and are now situated on the south side of the R. R. track.

JOHN S. FORMAN.

Subscribed and sworn to before me this 22 day of June 1899.

[SEAL.] M. D. THIBADEAU,
Notary Public.

Rehearing.

CONTESTEE'S EXHIBIT A1. E. J. Lake, Sten.

CLARKS FORK, KOOTENAI COUNTY, IDAHO,
June 22, 1899.

297 John G. Nagel first duly sworn deposes and says that in 1884 he settled on 160 acres of unsurveyed government land located on the north side of the N. P. R. R. track embracing that portion of the present townsite of Clarks Fork situated on the north side of track. That he erected a building thereon 110 feet from the R. R. track. That during the years of 1884 and 1889 he cleared, fenced and cultivated a tract of about 7 acres running parallel with and extending north from the R. R. That in 1886 he was appointed postmaster serving in that capacity till spring 1891. That during that period he conducted in connection with other occupations before mentioned a small general store in the building above referred to. That in the spring of 1889 the discovery of mineral in the adjacent mountains resulted in a considerable influx of miners and business men. That affiant responding to the demands made upon him platted the larger portion of the cleared tract into lots for building purposes. That during 1889 and the years following a considerable number of business houses and residences were erected, and with the gradual but steady development of the surrounding country the various branches of business represented developed into permanent establishments. That John E. White came to Clarks Fork in 1890 in the capacity as station agent for the N. P. Ry. Co. That in 1891 he erected a building on a tract of unsurveyed government land on the south side of the R. R. That in 1892, he moved with his fa*i*mly into said building. That all his improvements were
298 made on the south side of the R. R. That prior to the filing of his homestead entry he never claimed any land on the north side of R. R. nor m*a*de the slightest improvements thereon.

JOHN G. NAGEL.

Subscribed and sworn to before me this 22 day of June 1899.

[SEAL.] M. D. THIBADEAU,
Notary Public.

CLARKS FORK, KOOTENAI CO., IDAHO, *June* 21, 1899.

Affidavit of John B. Whitcomb who upon oath deposes and says, that he is a member of the firm of Whitcomb Bros. doing a general merchandise business in the town of Clarks Fork, that their place of business consisting of a two story building 24x50 feet a warehouse 16x24 in the rear and an annex 12x16 attached to side of building, which occupies 2 lots of the Clarks Fork townsite on the north side of R. R. track was erected on its present location during the spring and summer of 1895, at a cost of about $1500.00, that a log barn and frame cold storage room used in connection with their business

each occupying a lot on the townsite, north of track have been placed on their present locations in 1894 and 1896 respectively. That prior to White's claim to this ground there was one store, one saloon, one post office, and five residences, *all occupied* on the townsite north of track and off of right of way. That White has not at any
299 time made any improvements nor laid any claim whatever to that portion of the townsite situated on the north side of the R. R. track prior to the filing of his homestead entry in the fall of '95, all his claim and improvements being south of R. R. That the affiant in view of existing circumstances and strengthened by the decision of the Hon. Commissioners of the Gen. Land Office enclosed 5 lots on the townsite north of track in the spring of 1897. That during the spring and summer of 1898 he erected thereon a frame dwelling at a cost of about $6000.00 and has since occupied the same as his home.

JOHN B. WHITCOMB.

Subscribed and sworn to before me this 22 day of June, 1899.

[SEAL.] M. D. THIBADEAU,
Notary Public.

CLARKS FORK, KOOTENAI COUNTY, IDAHO, *June* 20, 1899.

Andrew Hasselroth being first duly sworn and deposes says that in the spring of 1898 he leased and fenced 2 lots of the Clarks Fork townsite north of the railroad track and began the erection of a dwelling house 16 x 26 and an addition 12 x 16 in size. That the said dwelling house was completed and that he with his family consisting of wife and 7 children moved into the same dwelling the summer of 1898. That the cost of erection of said dwelling was at least $300.00, not mentioned the labor expended in clearing
300 and fencing the lots. That he with his family came to Clarks Fork in 1894 and have lived there most of the time since. That he was encouraged to build his house on the townsite by the decision of the Hon. Commissioner of the Gen. Land Office rendered in favor of the townsite in Feb. 1897.

ANDREW HASSELROTH.

Subscribed and sworn to before me this 20th day of June A. D., 1899.

[SEAL.] WM. QUIRK,
Notary Public.

CLARKS FORK, KOOTENAI COUNTY, IDAHO, *June 19th,* 1899.

Walter S. Flemming being first duly sworn deposes and says, that during the month of October, 1897, he erected a one story frame dwelling house on 2 of the lots of the Clarks Fork townsite at a cost of $200. That the lots on which he built were enclosed and otherwise improved some time previous. That he has with his family resided in the said dwelling house continuously. That he has part of the lots under cultivation as a family garden. That he has been en-

couraged to build his home on those lots by the decision of the Hon. Commissioner of the Gen. Land Office in favor of the townsite in the contest then pending between John E. White and Henry Melder probate judge of the county in behalf of the townsite of Clarks Fork.

W. S. FLEMMING.

301 Subscribed and sworn to before me this 20th day of June, 1899.

[SEAL.] M. D. THIBADEAU,
Notary Public.

Rehearing.

CONTESTEE'S EX. A2. E. J. Lake, Sten.

CLARKS FORK, KOOTENAI COUNTY, IDAHO, *June —th*, 1899.

Carpenter Wilson being first duly sworn de*d*oses and says that during the spring of 1897 encouraged by the decision of the Hon. Commissioner of the Gen. Land Office in favor of the Clarks Fork townsite, he put up a substantial fence around 2 lots of the said townsite north of the railroad track cleared and partly plowed them up to plant potatoes thereon. That he had delivered some lumber on the ground preparatory to erecting a building on the lots. That in the spring of 1898, he began the erection of a story and a half residence and completed and moved into the same in the fall of 1898 and has since continuous —. That the cost of construction of said residence was $500.00. That for several months past Mr. John Reed with his family have been living in and occupying the lower floor of said building under lease from him. That he has all that portion of the lots not occupied by the residence and outbuildings seeded with lawn grass and planted with potatoes. That he is a workman and that all he possesses is invested in the said building and
302 improvements and that he is yet indebted for a portion of the material used in the construction of the same.

CARPENTER WILSON.

Subscribed and sworn to before me this 22 day. June 1890.

[SEAL.] M. D. THIBADEAU,
Notary Public

DEFENDANT'S EXHIBIT No. 1.

In the United States Land Office, Coeur d'Alene District, Idaho.

Henry Melder Probate Judge in and for Kootenai County, State of Idaho, as trustee for the Inhabitants and occupants of the town of Clark's Fork, Contestant, *vs.* John E. White, Contestee.

Involving a portion of H. E. No. 958, made November 27, 1895, to-wit: the N. W. ¼, S. W. ¼, Sec. No. 2, T. 55 N., R. 2, E. B. M.

Contest affidavit filed January 8, 1896.
Hearing set for Feb. 17, 1896, at 10 o'clock a. m.
Stipulation filed Feb. 11, 1896, continuing hearing till Feb. 24, 1896, at 10 o'clock a. m.

Now on this 24th day of February, 1896, the Contestant
303 in person and by his Attorneys Chas. L. Heitman, Esq. and D. H. Budlong, Esq.

Now at this time comes the said Contestee by his attorney, R. E. McFarland Esq., for the purpose of this motion and none other and moves that the notice of contest herein be quashed, set aside and held for naught for the following reasons.

First. Said notice does not contain any statement of facts which will warrant the cancellation of said entry. Said notice is vague and uncertain in this that the same does not contain any sufficient statement of facts that would entitle contestant to a cancellation of said entry but merely contains conclusions of laws and opinions of the contestant.

Second. Said notice of contest does not contain any sufficient description of the land covered by the said entry of contestee, John E. White, and does not set forth the date of said entry or the number thereof.

Which motion was by the register and receiver denied.

To which ruling the contestee by his attorney duly excepts.

Now at this time comes the said contestee by R. E. McFarland his attorney and moves that this contest be dismissed for the following reasons:

First. That the affidavit of contest herein does not state facts sufficient to warrant the cancellation of said entry.

Second. That said affidavit of contest is insufficient in this
304 that it contains no statement of facts sufficient to entitle the contestant to a cancellation of contestee's said entry but merely contains conclusions of law and opinions of the contestant.

Third. That it is not shown by said affidavit of contest that the necessary or proper petition setting out and containing matters, things and allegations required by the laws of the United States in such cases made and provided was ever presented to the probate or county judge of the county in which said land is situated.

Fourth. That said affidavit of contest does not show that any

declaratory statement in due or proper form setting out the facts required by law to be stated therein was ever filed or presented to be filed at the proper land office in the land district where said lands are situated.

Fifth. That it is shown on the face of the affidavit of contest herein that the contestant and all those claiming by, through and under him as beneficiaries herein have by lapse of time waived any and all rights to enter said tract or any part thereof under the provisions of the laws of the United States for townsite purposes.

Sixth. That said affidavit of contest is in many other respects informal, vague, uncertain and insufficient in law.

Which said motion was denied by the register and receiver.

305 To which denial and ruling contestee by his attorney duly excepts.

Now at this time the contestee called Mr. M. P. WHITCOMB, who being first duly sworn testifies as follows.

Q. State your name, age, residence and occupation?

The contestee objects to any testimony herein for the reason stated above in his said motions, and for the futher reason that this office has not jurisdiction to try this case.

Objection overruled.

Exception taken.

A. M. P. Whitcomb, age forty-five years, residence Clarks Fork, Idaho, occupation a merchant.

Q. How long have you resided at Clarks Fork?

A. I have resided there since the year 1890.

Q. Upon what tract of land according to the surveyed plat filed in this office have you resided since 1890?

A. On the N. W. ¼ of the S. W. ¼ of section No. 2, T. 55 N. R. 2, E. B. M.

Q. When did you first see this land?

A. In 1884.

Q. How if at all was this tract described by you occupied at that time?

A. It was occupied by a store, there was a store on this particular forty acre tract.

Q. How was this forty acre tract occupied in 1890?

306 A. It was occupied as a place of trade at that time.

Q. State the different kinds of business, if any and by whom conducted or carried on on this forty acre tract in 1890.

A. General merchandise store belonging to J. G. Nagle and A. D. Railton together with the postoffice, a saloon building occupied by Joseph Butler at that time conducted by Butler Bros. A saloon and restaurant owned and operated by George Roberts, I think Mr. Butler lived over his saloon building, Mr. Butler had one or two houses outside of his saloon that were occupied by tenants, there was a depot built I think in the fall of 1890, and a section house occupied by employés of the section. I think that was all the inhabitants of the town at that time outside of some little shantys and tents, etc.

Q. Were any other persons residing upon or carrying on business on this forty acre tract?

A. I believe not.

Q. Was any portion of this forty acre tract laid off in lots, and if so state where and about what portion?

Objected to as immaterial and incompetent, that if any lots were laid off on that tract it must have been done by way of platting and mapping the tract and in that event the plat or the map is the best evidence.

Objection overruled.

307 Exception taken.

A. On the north side of the Northern Pacific railroad track there was about 8 or 10 acres platted.

Q. State whether any persons were living upon or occupying for trade or business of the railroad tract? In 1890?

A. No sir.

Q. State whether or not these places of trade and business which you have mentioned were upon the lots laid off as you have stated in 1890?

A. Yes sir, they were.

Q. Do you know the contestee Mr. White?

A. Yes sir.

Q. Since what date have you know him?

A. Since the summer of 1890.

Q. Upon what tract as surveyed does he reside?

A. On the N. W. ¼ of the S. W. ¼ of section 2, T. 55 N., R. 2, E. B. M.

Q. When did he settle upon that piece of ground?

A. He lived in the depot in 1890, he moved onto the ranch as he called it in I think March, 1892.

Q. What was Mr. White's occupation in 1890 and since?

A. Agent for the Northern Pacific railroad.

Q. What lands did he claim as a ranch in 1892?

Objected to for the reason that it has not been shown that the witness knows what lands he claimed at that time.

Objection sustained.

308 Exception taken.

A. He claimed a portion of land laying south and east of the Northern Pacific depot.

Q. Examine this plat and state if you know what it is?

A. Yes sir, I know what it is. That is a plat of the forty acres in dispute made last November.

Q. What is it a map of?

A. A map of the town of Clarks Fork, Kootenai county, Idaho.

Q. Is that plat substantially correct?

Objected to as immaterial, irrevelant and incompetent and for the further reason that it has not been shown that this witness is competent to know whether or not the plat is correct and the foundation

otherwise for proving the correctness of said plat have not been properly laid or proved.

Objection sustained.

Exception taken.

A. Yes, sir, I would say that it was.

Q. Now please state what lands contestee claimed or occupied in 1892 and since that date up to the 27th of last November.

A. The portion of this plat that is unsurveyed on this plat, and unplatted, and land lying contiguous to it on the south and east.

Contestee objects to the answer and asks to have it stricken out for the reason that the plat has not been offered or introduced in evidence, which fact makes the answer vague and uncertain
309 as the same does not identify any lands.

Objection sustained.

Exception.

Q. About how many acres was included in the land which Mr. White claimed as, as described by you?

A. The land that he had fenced would say about eighty acres.

Q. Where do you reside and where is your place of business?

A. I reside on this forty acres in dispute on the south side of the railroad track, and west of Mr. White's ranch. My place of business is on the north side of the railroad track, the Northern Pacific railroad track.

Q. Examine this plat and see if it is a true copy of the original plat filed in this office.

Objected to as immaterial, irrelevant and incompetent.

Objection overruled.

Exception taken.

A. Yes sir, it is a correct tracing of the map filed here.

Q. Now the contestant offers the copy of the plat marked contestants' exhibit "A" as evidence in this case.

Objected to for the following reasons:

First. Incompetent, irrevelant and immaterial.

Second. Said map hasn't been properly proven or identified.
310 Third. It is not properly certified or authenticated or shown to have been made by any one authorized or competent to make the same.

Objection overruled.

Exception taken.

Said plat was admitted in evidence and marked Contestants' Exhibit "A."

Q. Upon what lot and block as per this plat do you reside?

A. On lot No. 10, in block No. 11.

Q. Upon what lot and block is your place of business.

A. On lot No. 1 in block No. 10.

Q. How long have you resided upon block 11?

A. Since the summer of 1892.

Q. How long has your store been upon block 10?

A. Since August, 1895. It was formerly on the right of way of the Northern Pacific Railroad company, it was there since 1884. The right of way was supposed to be 100 feet, but afterwards it proved to be 200 feet, consequently we moved the store building back off the right of way and on to lot 1 in block 10.

Q. Prior to November, 1895, and during your residence upon the land in contest, state what lands if any were claimed by you upon this forty acres?

Objected to as immaterial and irrelevant, there being no contest between the witness and this contestee.

Objection sustained.

311 Exception taken.

A. All that portion that is laid out in lots and blocks lying on the south side of the railroad track.

—. State if there was any fence stakes or natural objects or monuments as a dividing line between you and White and if so what?

Objected to first as leading, second as immaterial and irrelevant.

Objection sustained.

Exception taken.

A. Yes sir, there was a fence between Mr. White and myself, and in 1892 or 1893 there was county road laid out as marked on the plat in evidence, said road running from the Northern Pacific railroad to the ferry at the Clarks Fork river.

Q. State whether or not Mr. White at any time prior to November 27, 1895, ever occupied or claimed any portion of this forty acre tract lying south of the railroad track and west of the fence and county road which you have described?

A. No sir, not to my knowledge.

Q. State whether or not he ever claimed any portion north of the railroad track up to the date of his homestead filing?

A. No sir, he never claimed any land north of the track on this forty.

Q. What marks the southern boundary of the ranch which you have spoken of as White's?

A. The Clarks Fork river.

Q. What the eastern boundary of his claim?

312 A. As he had it fenced the Northern Pacific railroad track.

Q. Up to the date of this survey who claimed the land lying west of the county road and south of the railroad track?

Objected to as immaterial and irrelevant, and further reason that it has not been shown that any one claimed or occupied it.

Objection sustained.

Exception taken.

A. I owned and occupied the land myself, I had a possessory right filed on it.

Q. Were you one of the petitioners for the townsite of Clarks Fork?

Objected to as the petition is the best evidence as to who were the petitioners.

Objection sustained.

Exception taken.

A. Yes sir.

Q. Have you had experience in the construction of stores, residences, etc., to enable you to know the value and cost of construction of building?

Objected as immaterial and irrelevant.
Objection sustained.
Exception taken.

A. Yes sir, I am a carpenter by trade.

Q. Please state the value of the several and different improvements upon this forty acre townsite in 1890?

313 A. George Roberts had a saloon worth about $200, there was a store building Nagel and Railton, value about $500, Butler had a saloon building value about 4 or 5 hundred dollars, there was other buildings, residences and dwellings of the value of about $200, that's about all the buildings there at that time.

Q. State the value of the several buildings on that tract immediately preceeding the filing of the plats in this land office Nov. 27, 1895.

A. Whitcomb Bros., and Nagle store building value $2500, George Roberts' saloon building, hotel and store value about $2000, Joseph Butler saloon building and residence and other buildings to the value of about $2500, the Butler buildings are on different lots, Snow and Kelly have a saloon building value about $800, I have a residence value about $150 and other buildings to the value of about $50, my residence and out buildings are on the south side of the track, I have in addition to that on the tract one residence worth about $400, and one residence worth $75 and a dwelling worth about $75, John E. White has a residence and other buildings worth about $300, I believe that is all except the railroad buildings that are on the right of way.

Q. How long, or up to what time did the lots remain as you first saw them staked off on this forty?

A. They were laid out in 1889 and continued in that shape until this new plat was made November 22, 1895.

314 Q. What improvements in the way of fencing, etc., and how much land have you cultivated on that portion of your claim lying within this forty acres contested.

Objected to as immaterial and irrelevant, the witness not having any contest with the contestee in this case.
Objection sustained.
Exception taken.

A. I have about 1½ under cultivation, I have also an outside fence on two sides of that portion claimed by me, the 1½ acres is nearly all out to orchard.

Q. Are you a citizen of the United States and if so state whether native or naturalized?

A. Yes sir, I am native citizen of the United States.

Q. Now at this time the Contestee by his attorney, R. E. McFar-

land, moves that all of the testimony of haid witness Whitcomb herein be stricken out and disregarded for the following reasons:

First. This being a contest between *an* alleged townsite claimants and Contestees said evidence is irrelevant and immaterial, no evidence having heretofore — introduced of any petition or declaratory statement on behalf of the Probate or County Judge of said County or any townsite claimants.

Second. Said evidence is immaterial, irrelevant and incompetent for the reason that the proper foundation has not been laid herein for the admission thereof.

315 The attorneys for the Contestant here state that the witness Whitcomb was introduced for the purpose of showing that the forty acres in contest was occupied for the purpose of trade and business since 1884 and up to the filing of the plats of the township in the land office and also for showing the land that was claimed by contestee and other parties upon this same forty prior to the homestead filing of contestee, and also for the purpose of showing the value of the different improvements upon the forty in contest at different periods prior to the filing of the plat of the township in the land office, that the trustee of the townsite and probate judge of Kootenai county, Idaho, the Hon. Henry Melder will be placed on the witness stand and will produce the application of the residents of the townsite for the establishment of Clarks Fork townsite and also the declaration made for filing thereon and all other matters which by law are required in such cases made and provided. Upon this statement of facts the motion of contestee is overruled.

To which ruling the contestee duly excepts.

Now at this time the cross examination of said witness Whitcomb by request of contestant is continued to follow the testimony of William Ashley, Jr.

WILLIAM ASHLEY being called and sworn testifies as follows:

Q. State your name, age, residence and occupation.

A. William Ashley, Jr., age past twenty one, residence
316 Rathdrum, Idaho, occupation County Surveyor for Kootenai county, Idaho.

Q. How long have you been County Surveyor?

A. About 5 years.

Q. Contestant's exhibit "A" was shown to witness for identification. State what contestant's exhibit "A" is if you know?

Objected to as irrelevant, immaterial and incompetent, and further reason that the exhibit itself is the best evidence of what it is.

Objection sustained.

Exception taken.

A. It represents the townsite plat at Clarks Fork.

Q. Is that a copy of the original plat on file in this office?

A. Yes sir it is.

Q. Who made it?

A. I did in November, 1895, it was completed on the 22 day of November.

Q. Is that a correct plat of the land in controversy?

Objected to on the ground that it has not been shown that the witness knows what land is in controversy in this case.
Objection sustained.
Exception taken.

A. It is to the best of my knowledge.
Q. Do you know the land in controversy, from the survey?
A. Yes sir.
317 Q. Were you employed to plat the land in controversy?

Objected to as immaterial and irrelevant.
Objection overruled.
Exception taken.

A. Yes sir.
Q. What area if you know is there contained in the S. E. corner of the land in controversy south of the railroad track and east of the county road.
A. Including the strip of right of way there would probably be about 6 or 7 acres.
Q. Did you survey all of the land in controversy into blocks and lots in November, 1895?
A. No sir I did not. I did not survey the part included in the fence of J. E. White, that is the part east of the county road and south of the railroad track.
Q. Why did you not survey that portion of the land in controversy?

Objected to as immaterial.
Objection sustained.
Exception taken.

A. I was forbidden to go inside of the fence by J. E. White the contestee in this case.
Q. Did Mr. White forbid you from surveying into blocks and lots any other portion of the land in controversy?

Objected to as immaterial, irrelevant and incompetent.
Objection sustained.
318 Exception taken.

A. No sir he did not.
Q. What land is embraced in the controversy?

Objected to as immaterial, irrelevant and unintelligible and for the reason that the plat introduced in evidence and the map filed in the United States evidence is the best evidence of the land contained in that tract.
Objection sustained
Exception taken.

A. It is N. W. ¼ of the S. W. ¼, section 3, T. 55, N. R. 2, E. B. M.

The contestee moves that the testimony of said witness Ashley be stricken out and not considered herein for the reason that it is imma-

terial and irrelevant this being a contest beween Melder as Judge of Probate as Trustee for the inhabitants of the alleged townsite of Clarks Fork, and no foundation having been laid for said testimony, and for the reason that said testimony is not given in legal or proper order.

Objection overruled.

Exception taken.

WM. ASHLEY JR.

Subscribed and sworn to before me this 24, day of February, 1896.

——— ———, *Register.*

Now at this time the cross examination of Mr. WHITCOMB was commenced.

319 Q. Were you living at Clarks Fork in 1884 the time you first saw this land?

A. No sir.

Q. What were you doing then?

A. I was going through that country on a prospecting trip.

Q. How long did you stop there on that occasion?

A. About an hour.

Q. Did you make an examination of the tract during that one hour?

A. No sir not a personal examination only an observation.

Q. At that time did you know the names of the business men who resided at Clarks Fork?

A. No I think not.

Q. Did you know John E. White at that time?

A. No sir.

Q. When was the next time you saw this land?

A. In 1888.

Q. Did you live in Clarks Fork in 1888?

A. No sir.

Q. What were you doing there then and how long did you stay?

A. I was a bridge foreman at the time I think I was there twice during 1888, the first time perhaps I remained about ten minutes the next time I was there some two or three hours.

Q. At those times did you make any examination of this land?

320 A. No sir, not to make a personal examination of the land.

Q. When did you first go to Clarks Fork to live?

A. In either November or December 1890.

Q. Had you stopped in Clarks Fork before that time other than at the time you have testified to?

A. Yes sir.

Q. How often and how long each time?

A. I was there during the summer of 1889 for about six weeks, that is the only time I remember of being there.

Q. What was your occupation at that time?

DARK PAGE BLEEDTH

A. I was foreman of the bridge and building crew of the Northern Pacific Railroad Co.

Q. How long had you been in the employ of the railroad company?

A. With the exception of about two years I have been in the employ of the Railroad Company since 1880.

Q. What business were you engaged in from the time you settled at Clarks Fork till the spring of 1894?

A. Railroad business, I was also engaged in merchandising and milling at Clarks Fork.

Q. In 1889 were John G. Nagel, George Roberts, Joseph Butler and yourself or either of you doing business in Clarks Fork?

A. Yes sir Joseph Butler, George Roberts and John G. Nagel were in business there.

Q. When did you settle upon the land in dispute?

A. I put my house up the spring of 1891, I moved on the
321 place myself in the spring of 1892.

Q. Was John E. White living on that tract when you moved into that house?

A. Yes sir, I believe he was, when I moved my family there John E. White was living there, I think he moved in March, 1892.

Q. Will you swear that he did not move into his house on that disputed forty as early as the 26 day of Feb. 1892?

A. I would not, I am not positive.

Q. Do you know the exact date when White began the construction or erection of his house on that forty?

A. No sir.

Q. Doesn't the Northern Pacific right of way extend through that forty?

A. Yes sir.

Q. On the 26 day of February 1892 was any one other than John E. White residing upon the forty in dispute excepting those who were located on that right of way?

A. Yes sir.

Q. Who?

Q. John F. Vinton.

Q. Was there any one else there at that date?

A. I think there was but, I would not be positive, there was another house back of the right of way that I think there was a family living in.

Q. Is Vinton living there yet?

A. No sir I bought him out of his store and bought his
322 house.

Q. When did he leave that forty?

A. I wouldn't be positive, I think he left there in the fall of 1893.

Q. On the 26, day of February was there a store saloon, hotel, restaurant, or any other business house upon that disputed forty except what was located on the right of way?

A. I think not.

Q. Didn't you testify in your examination in chief that White didn't claim that forty until he filed on it in the land office?

A. Yes sir I believe he did. I never knew of his having any claim whatever outside of his enclosure that he had as a home.

Q. On the 29, day of April 1895, at the town of Clarks Fork didn't you approach him and ask him to permit you to file on one of those forties embraced in his homestead application and he replied that he would not?

A. No sir I don't think I ever had such conversation?

Q. And didn't you reply that you only wanted to file on one of those forty's and that unless he permitted you to do so you would contest his entry and make him trouble?

A. I don't remember of having such conversation with him.

Q. Will you positively say that you had no such conversation with him?

323 A. I don't think I had, I wouldn't say positively. I had a conversation with him about that time, but it was not in relation to my filing on one forty.

Q. At the time referred to by you, didn't you make this statement to him "referring to a strip of land included in White's present homestead entry I was going to file on this forty but if you are going to file on the whole 160 acres I will file on the 160 to-, and give you a contest"

A. I don't remember of having that conversation with him.

Q. What conversation did you have with him at that time or about that time with reference to this land?

A. I met Mr. White one day on the railroad track, I asked him if his intention was to file on my home, his answer was that he would take what ever his lawyers gave him, I says White that is not the question I asked you, I repeated the question to him again and he admitted that it was his intention to file on my home, that was all the conversation we had.

Q. Then you did know prior to the date of his filing in the land office that he intended to enter this land?

A. I knew nothing only what he said that was the only talk we ever had. During 1895 in relation to the land.

Q. What has been your relation to Mr. White for the last two years as to being friendly or otherwise?

324 A. Well part of the time it was friendly and part of the time not very friendly.

Q. Last summer or fall didn't you have him arrested?

A. Yes sir.

Q. And prior to that time didn't you circulate a petition to remove him from his position as agent?

A. I don't think I did, there was a petition sent to me that I knew nothing about before it came to me, and I left it on my desk and I think asked parties to sign it.

Q. Didn't you, Nagel and Joseph Butler bring about this townsite application and this contest because John E. White accepted a position with the Northern Pacific Railroad company at Clarks Fork, during the strike in 1894?

A. No sir, I got up this townsite petition in order to protect myself and my property, it had nothing to do with his working for the railroad company.

Q. Didn't you intend to file a homestead for the forty in dispute together land before White made his entry?

A. Yes sir, that was my intention of course, I considered that I had rights there as well as White or anybody else, but I never had any desire to beat White out of his property or any of his possessions.

Q. On the 17 day of Feb., 1896, at the land office in Cœur d'Alene, Idaho, didn't you, in the presence of C. L. Heitman, R. E.
325 McFarland and the receiver, Mr. Reininger, make this statement, "I believe I will file a contest against White's entry myself," or words to that effect?

A. I think I made such remark as that.

Q. Did this man Roberts, whose name mentioned in the affidavit and notice of contest herein sign the petition to have a townsite established at Clarks Fork?

A. No sir.

Q. Were you engaged in business in Clarks Fork, with John G. Nagel during the strike in 1894?

A. Yes sir.

Q. During that strike or shortly thereafter were not you, Nagel and Butler required to move your buildings off the Northern Pacific company's right of way?

A. No sir. I believe Mr. Butler had notice—us people never got no notice.

Q. At any rate during or shortly after the strike didn't you, Nagel and Butler move your buildings off of the railroad right of way?

A. No sir, we didn't move our buildings off for more than one year afterwards, and then moved it on our own account, holding leased ground where our building formerly was, up to the first of this year. Butler moved off the fall after the strike.

Q. This man Roberts, whose name is mentioned in the affidavit of contest has his building and is still doing business on that right of way, is not he?

A. Yes sir.

Now at this time the hearing in this case was continued
326 until Tuesday morning February 25, 1896, at nine o'clock a. m.

Now on this 45 day of February both parties being present in person and being represented by their attorneys Chas. L. Heitman and D. H. Budlong for contestant and R. E. McFarland for contestee, the following proceedings were had, to-wit:

The cross-examination of witness WHITCOMB was continued:

Q. Were you acquainted with a man by the name of John McQuade who had a ranch in the vicinity of Clarks Fork, which was afterwards occupied by a man by the name of Durkey?

A. I am acquainted with McQuade.

Q. Didn't that McQuade or Durkey ranch join the tract of land claimed by White?

A. Yes sir.

Q. After the public survey of those lands didn't the forty which is now in dispute lap over onto the said claim of McQuade or Dur-

key to the extent, that about six acres of this disputed forty now lies within the limits of the McQuade or Durkey ranch?

A. Well I think there is.

Q. Before the survey didn't you claim what was known as the McQuade or Durkey ranch?

A. Yes sir.

Q. And didn't you file possessory right under the laws of this state for the tract which was then known as the McQuade or Durkey ranch?

A. Yes sir I did.

327 Redirect:

Q. Had you any business transactions with any one in Clarks Fork when you passed through in 1884?

Objected to as immaterial and irrelevant.

Objection sustained.

Exception taken.

A. Yes sir, I went into the store of what proved to be afterwards J. G. Nagel's, and bought a can of baking powder.

Q. State whether at that time or not Mr. Nagel's at that time was engaged at that place in merchandising.

A. Yes sir. I didn't know Mr. Nagel at that time but afterwards recognized him as the same man that was here.

Q. When did you settle upon the McQuade ranch?

A. I built my house in April 1891. Claim settlement from that time as that was the only one I had in existence anywhere.

Q. When did Mr. White commence his house on this same tract?

A. I wouldn't be positive, some time in May or June or July following, I wouldn't be positive as to date.

Q. Which house was first commenced and first constructed yours or White's?

A. My house.

Q. Where was Mr. White living when you built your house?

328 A. In the Northern Pacific Railroad depot.

Q. How long did he reside there and how was he employed if you know?

A. He resided there from sometime in the summer of 1880 until he moved up on his ranch I think in March 1892.

Q. Was the house in which Vinton resided located on this forty acres and if so was it or was it not on the Railroad company's right of way?

A. Yes sir it was built on this land and was not on the right of way.

Q. When was the house in which Vinton resided built?

A. In the spring of 1891.

Q. How was Mr. White employed while he resided in the Northern Pacific depot?

A. As agent for the Northern Pacific Railroad Company.

Q. At what time or times did you intend to file a homestead on this land in dispute as stated in your cross examination?

A. Up until the first of September 1895, my intention was to file homestead papers on this government land, I made a trip into Missoula, Montana, to secure Counsel, I was advised that this land had been used as a place of trade and business prior to my location there, therefore was not subject to homestead entry and was advised if I wished to procure title to my property that the way to do so was to file or take this land as a Government townsite.

329 Contestantee objects to the answer as not being responsive to the question and as being irrelevant, immaterial and incompetent and more particularly objects to that part of said answer with relation to any intention of the witness or to any advice given him with reference to the said land being immaterial, irrelevant, incompetent and hearsay testimony, and ask to have it all and every part of said answer stricken out.

Objection sustained, and the register and receiver here suggest that the settlement of Mr. Whitcomb on this tract as a homesteader has nothing to do with the case, as it is a question between the inhabitants of the town of Clarks Fork and John E. White.

To which ruling the contestant duly excepts.

Q. In conversation here in this land office on February 17, 1896 why did you state that you believed you would file a contest against White's entry?

A. I had understood that Mr. White had made the remark that if I failed to file contest papers inside the ninety days that I would lose all of my rights on this land, counsel advised me not to file a contest for a homestead entry.

Q. When you built your new store in 1895 off the right of way and on the land in dispute state whether or not Mr. White notified you not to do so or entered any objection whatever to the moving and construction of your buildings?

A. No sir he did not.

Q. What is the character of this land in dispute is it
330 agricultural, mineral, desert, or stone and timber land?

A. Agricultural land.

Recross-examination:

Q. Wasn't White's lumber of which his present house was built on this forty at the time you moved your lumber thereon?

Objected to as immaterial and irrelevant.

Objection overruled.

Exception taken.

A. I think Mr. White's lumber was piled up on the railroad track and on the depot platform at the time.

Q. Will you state positively that White's lumber was not upon the ground where his house was constructed before you placed your lumber upon that ground?

A. No sir I wouldn't state positively but I think not.

Q. When did you order your lumber of which your house was built?

A. About the first of April 1891. I think it was the 8th of April.

Q. Do you know when White ordered his lumber?

A. I do not remember the date some time before I ordered mine.

Q. Wasn't White's lumber on this forty on the present site of his house and his house in course of construction before that house of Vinton was built?

331 A. That I wouldn't be positive of, I wouldn't be certain. I think not.

Q. What business were you in at the time you had your house constructed upon that forty?

A. Working for the railroad company in the capacity of foreman of the bridge gang.

Q. What scope of territory did you operate in as such foreman?

A. From O'Keef's bridge to Hope a distance of about 150 miles.

Q. Isn't the greater part of that territory in the state of Montana?

Objected to as immaterial, irrelevant and incompetent, and the register is requested to summarily put a stop to such irrelevant questions.

Objection sustained.

Exception taken.

A. Yes sir.

Q. When did you first begin to occupy the house you built on this forty in person?

A. In 1891, I think in the month of May.

Q. Isn't it a fact that you did not spend a single day or night in that house during the month of May 1891.

A. No sir I think I stayed there two or three nights with my wife in May 1891.

Q. When did you move into that house with your family?

A. Either in April or May, 1893.

332 Q. Where did your family reside from April, 1891, till they moved into this house in 1892?

A. I was working for the Northern Pacific railroad company and my family resided with me in the outfit cars in the states of Idaho and Montana.

Q. Wasn't White living in the house now occupied by him on that disputed forty and hadn't a child been born to him in that house prior to the time you and your wife moved into your house on that forty?

A. He and his wife were living in the house when we moved into our house, whether or not he had a child born there I don't know.

Q. In your re-direct examination you stated that in 1895 when you moved off of the Northern Pacific right of way and built your store house on this disputed forty that White made no objection to your building the store there and gave out no notice to quit—didn't you know that White claimed this disputed forty?

A. No sir, he had told me at one time that he intended to file on this piece of land but never told me he claimed it.

Q. How do you harmonize that statement with the following

answer made in your cross-examination on yesterday which is found on page 19 of this testimony, to-wit:

"I met Mr. White one day on the railroad track, I asked him if his intention was to file on my home, his answer was that he would take whatever his lawyers gave him, I says Mr. White that is
333 not the question I asked you—I repeated the question to him again and he admitted that it was his intention to file on my home that was all the conversation we had.

A. My home is upon the south side of the track and my store is on the north side of the track, he never claimed on the north side of the track that I know of.

Q. Is not your store building and your dwelling house on this forty in dispute?

A. Yes sir.

W. P. WHITCOMB.

Subscribed and sworn to before me this 25 day of February, 1896.

——— ———, *Register.*

HENRY MELDER, being called, sworn, testified as follows.

Q. State your name, age and occupation.

A. Henry Melder, over twenty-one years of age, residence Rathdrum, Idaho, occupation probate judge.

Q. Is the town of Clarks Fork the occupants of which you represent, incorporated or not?

A. It is not incorporated.

Q. Did you in your official capacity offer to file a declaratory statement on the land in controversy and if so when and where.

Objected to as immaterial and irrelevant and incompetent,
334 the declaratory statement and endorsements thereon being the best evidence.

Counsel for contestants says the question is leading up to the introduction of the declaratory statement.

A. On the 27 day of November, 1895, I tendered a declaratory statement to the register and receiver of this land office for the tract in controversy.

Contestant now offers in evidence document marked Contestants Exhibit "B."

Contestee objects to the introduction in evidence of said document marked contestant's exhibit "B" for the following reasons.

First. It purports to be a copy of a certified copy of a declaratory statement and is not the original document and therefore is hearsay evidence, the original document being the best evidence and for the further reason that no foundation has been laid entitling said copy to be admitted it having not been shown that the original is lost or beyond the contro- of contestant.

Second. It is immaterial, irrelevant and incompetent in this that it has not been shown that said probate judge was authorized to make said declaratory statement or said entry thereunder or therewith or thereby for the reason that there is no proof that any peti-

tion in due or proper form signed by the inhabitants of the town of Clarks Fork, praying requesting or requiring said probate
335 judge to make said declaratory statement for or in behalf of such inhabitants.

Third. That said de-laratory statement is insufficient in law and does adhere to the statutes of the United States with reference to the filing of declaratory statements for townsites entries in such cases made and provided.

Fourth. This objection is made to cover the introduction of said document and to the endorsement thereon and such and both of them.

Objection overruled—the orginal document is now on file in this office.

Exception taken.

Document marked exhibit "B" is at this time admitted in evidence.

Q. What caused you to offer to file that declaratory statement?

Objected to as immaterial and irrelevant.

Objection overruled.

Exception taken.

A. By a petition signed by the inhabitants of Clarks Fork praying that I as probate judge file declaratory statement for the land included in the townsite of Clarks Fork, as trustee for the use and benefit of the inhabitants and occupants thereof.

Now at this time contestant offers in evidence documents marked contestants exhibit "C" purporting to be a petition, to which contestee objects upon the following grounds, to-wit:

First: That said pretended petition offered in evidence
336 was never filed in the land office, nor was there any copy of said petition filed in the land office.

Second. That said petition is informal and insufficient in law in this, that it does not contain any statement giving the number of inhabitants of the alleged town of Clarks Fork, it does not show in what county or state the said town of Clarks Fork is situated, it does not show or contain any statement to the effect that the persons whose names are subscribed thereto or any or either of them is a citizen of the United States, and it does not show or contain any statement to the effect that any or either of the subscribers to the said petition has declared his or her intention to become a citizen of the United States and fails to show, allege or state any fact that would entitle said subscriber or either of them to enter any lands under the laws of the United States for townsite purposes or otherwise, and fails to show that said subscribers or any or either of them are or is qualified to enter, acquire or hold any lands under or by virtue of the laws of the United States for townsite purposes or otherwise.

Third. Said alleged petition is in many other respects informal and insufficient in law and does not comply with the statutes in such case made and approved.

Counsel for contestant in reply states as follows:

That the substance of the objection is immaterial, that as a complete answer to the objection and also a complete refutation of the statements made in the objection we offer the petition, to
337 which reference is made.

Contestee desires to make the further objection.

First. Said petition is irrelevant and immaterial and incompetent.

Second. It does not show or allege that the subscribers thereto or any or either of them or any other person or persons reside upon or carry on any business or occupation upon the premises therein described.

Objection overruled to the whole of the objection.

Exception taken.

Now at this time document marked Contestant Exhibit "C" is admitted in evidence.

Q. What action did the land office take on the declaratory statement offered by you for the land in controversy?

A. It was rejected for the reasons endorsed by the register on the declaratory statement.

Q. Do you personally know the land in controversy and if so how long?

A. Yes sir, I have known it for about ten years.

Q. What is the character of this land, mineral or non-mineral?

A. Non mineral.

Q. Who, if you know, have been living on this land during the past ten years?

A. Prior to 1889 Mr. John G. Nagel and -r. Railtin had a store there and a saloon also, after 1889 Mr. Roberts and Al and
338 Joe Butler. Mr. John F. Vinton, Mr. Butler had a saloon and a restaurant, Mr. Roberts had a store, a saloon and a hotel, Mr. Nagel and Whitcomb Bros. has a store, at one time there was a butcher shop there in Mr. Butler's building.

Q. Has the land been occupied continuously or not since 1884 for business purposes?

A. It has.

Q. State whether or not you know of a town settlement at that place?

Objected to as immaterial, irrelevant, incompetent and as calling for a conclusion and opinion of this witness.

Objection overruled.

Exception taken.

A. I do, in the spring of 1889 Mr. Nagel came down to see me about surveying a townsite and I went up there and surveyed a townsite in 1889.

Q. Are you a surveyor?

A. Yes sir.

Q. Look at that map, Judge, and state what it is.

A. It is a plat of the ground I surveyed at the time.

Contestant at this time offers a plat marked contestant's exhibit "D" to the introduction of which contestee objects.

First. That it is immaterial, incompetent and irrelevant.

Second. That the pretended map does not show upon what scale it is made or based or upon what tract or subdivision the same
339 is made, does not show what tract of land the pretended plat or map is a map or plat of, fails to show in what section or township the land of which the pretended map or plat is made is situated.

Third. That said pretended map or plat bears upon the face thereof evidence of mutilation and erasure which is unexplained. That said pretended map or plat is not certified or authenticated and is not shown to have been made by any authority of law, and the correctness thereof has not been certified, proven or otherwise shown.

Contestant's replies are immaterial for the reason that contestant proposes to prove by the introduction of the map in question the existence of a town settlement for town purposes on the land in controversy at the time that the said survey and map were made, all of which was before the government survey of the land in controversy.

Objection overruled.

Exception taken.

And document marked contestants exhibit "D" admitted as evidence.

Q. State what land this map covers with reference to the government survey?

Objected to as irrelevant and incompetent, and for the further reason that the map itself should show it and is the best evidence of that fact.

Objection overruled.

Exception taken.

340 —. It covers a portion of the land in contest.

Q. What portion?

A. Portion of that part of the land in controversy lying on the north side of the Northern Pacific railroad track.

Q. Was this land surveyed or unsurveyed at the time this map was made?

A. It was unsurveyed by the United States.

Q. State if you know whether any of those lots as surveyed by you were occupied, and for what purpose?

A. Yes sir, there was some of them occupied for trade and business.

Q. What lots were occupied for trade and business?

A. Lots 7 and 8 in block "B" were occupied by Mr. Nagel as a general merchandise and post office, Mr. Butler occupied lots 1 and 2 and 15 and 16 in block "C" as a saloon and dwelling house and restaurant. Mr. Roberts lot 4 in block "B" as a hotel, saloon and merchandise store.

Q. What was the character of the business houses occupied by those men?

A. When I made the survey the improvements were light, Mr. Nagel's was the only substantial building there.

Q. What was the character of the buildings prior to 1890 and since?

A. Prior to 1890 they were of small value but since they have improved.

341 Q. What was the character of Mr. Butler's building in 1890?

A. It was a very good building, a saloon down stairs, and a lodging house up stairs, and a residence back of it.

Q. By what name has that settlement been called?

A. The townsite of Clarks Fork since long before 1889.

Q. How is the land covered by the plat you made at Clarks Fork situated with reference to the Northern Pacific right of way?

A. When I made the survey it was the belief that the Northern Pacific had only 100 feet on each side of the track, and I remember I measured 115 feet from the center of the track north where the south line of the survey of the townsite commences.

Contestee objects to the answer of witness, and moves to have stricken out for the following reasons:

First. It is not responsive to the question.

Second. It is immaterial, irrelevant and incompetent.

Third. The belief or general opinion of the people with reference to the width of the right of way is not admissible in any case, and is not binding upon contestee.

Objection sustained.

Exception taken.

Now at this time Contestant by his attorney announces
342 that he is through with the witness Melder.

Now at this time the Contestee objects to any and all testimony of this witness and the documentary testimony introduced with reference to the declaratory statement and to the attempt of witness to file said declaratory statement and to enter said tract for townsite purposes for the reason that it has not been shown that the pretended declaratory statement or any of the papers used by the witness in attempting to make his pretended townsite entry was ever accompanied with a certificate of the clerk of any court of record certifying that witness or any one else who attempted to file said declaratory statement or make said entry was the duly elected qualified or acting probate or county judge of the county in which said tract is situated. Therefore the contestee asks that all such testimony be stricken out and not considered in the determination of this case.

Contestant alleges that the foregoing objection and motion are immaterial for the reason that contestant's declaratory statement was rejected upon grounds other than those set forth in the foregoing objection, and furthermore, that if the homestead entry upon the land in controversy be cancelled the contesant will then have an opportunity to perfect his filing thereon.

Objection overruled.

Exception taken.

343 Now at this time contestant offers document marked Contestant Exhibit "E".

To which introduction contestee objects on the grounds that it is not evidence of the official character of the witness or any one else. The best evidence being a commission issued and signed by the clerk of the board of county commissioners of Kootenai county, Idaho, which is *ex-officio* the board of canvassers of said county.

To which contestant replies that the certificate of election referred to by contestee's counsel is not evidence that the person receiving the certificate qualified and entered upon the duties of his office. The certificate offered in evidence under the seal of the district court and signed by the clerk thereof does state that he was both duly elected, that he qualified and is acting probate judge in and for Kootenai county Idaho.

Objection overruled.

Exception taken.

Cross-examination:

Q. When was the last time that you was upon this disputed forty to make an examination of it.

A. I was at Clarks Fork last fall visiting the schools I didn't examine the land.

Q. When was the last time you examined this land in dispute?

A. Last fall.

Q. Did you examine then?

A. I looked over the buildings and streets, I didn't exam-
344 ine the land to see whether the soil was black or white.

Q. Have you made a survey of this tract since the public survey thereof?

A. No sir.

Q. Have you made an examination that is to say have you been over the land with a view to ascertaining its position with reference to the public survey, since the public survey thereof?

A. No sir.

Q. Then so far as your personal knowledge is concerned you do not know whether the town of Clarks Fork is situated on the forty in dispute or not do you?

A. No sir I do not.

Q. Are you in a position to say whether or not on the 26th day of February, 1892 any other person or persons than John E. White was residing upon this particular forty in dispute?

A. I am not.

Q. Are you in a position to say whether or not on the 26th day of February, 1892 any store, hotel, restaurant, saloon, or other place of business was located or situated upon this particular forty in dispute?

A. I am not, I know the town but I don't know what subdivision it is on.

Q. Were not each and all of the business houses which you men-

tioned in your direct examination situated upon the Northern Pacific right of way till as late as the summer of 1894?

345 A. If the right of way extended 200 feet they were.

Q. Did I understand you to say that you prepared the map designated as contestants exhibit "D" at the request of Mr. Nagel?

A. Yes sir.

Q. What year was that?

A. In the latter part of May 1889.

Q. Was not this map made out for private purposes in order to aid Mr. Nagel to sell to any one who should desire to purchase lots in that vicinity?

A. The survey was made to enable Nagle to lease lots during the mining excitement.

Q. Do you know of his making any such leases of lots in that vicinity?

A. Not personally only by hearsay.

Q. Did anyone else but Nagel claim the land of which this exhibit "D" is the plat or map?

A. No sir; not at that time.

Q. Did Mr. Nagel apply to you to survey and plat a town there for the purpose of entering a townsite under the laws of the United States.

A. No sir.

Q. Then what he did at that time with reference thereto was for speculative purposes was it not?

A. I don't know.

Q. Didn't — at the town of Rathdrum last September or October tell John E. White that Nagel had you to survey and plat some lands up there at Clarks Fork for the purpose of enabling him Nagel

346 to make leases with divers persons for lots for the term of ninety nine years?

A. Yes I may have said so. In 1889 he laid out lots to lease to people for 99 years.

Q. Is that plat in the same condition as it was when you completed it and handed it over to Mr. Nagel with reference to lots and blocks?

A. To the best of my knowledge it is I haven't seen the map since 1889 until now.

HENRY MELDER.

Subscribed and sworn to me this 25th day of February 1896.

——— ———,
Register.

JOSEPH BUTLER being called and sworn on behalf of contestant testified as follows:

Q. State your name, age, residence and occupation.

A. Joseph Butler, age thirty five years, residence Clarks Fork Idaho, occupation hotel and saloon keeper.

Q. How long have you been living at Clarks Fork?

A. Since June 1889.
Q. Have you been living there continuously since that time?
A. Yes sir.
Q. Do you know the forty acre tract of land in controversy?
A. Yes sir.
347 Q. Where is your place of business with reference to this land?
A. It is on this forty acre tract. On lot 10 in block No. 9, according to contestants exhibit "A."
Q. How long has your place of business been on said lot No. 10 in block No. 9.
A. It has been on a part of the land that lot covers since 1889.
Q. Where was your business building with reference to any other lot at that place.
A. It was about 95 feet in front of its present location and nearer to the railroad track.
Q. When you first built your place of business from whom did you get the lots of land.

Objected to as immaterial and irrevelant.
Objection sustained.
Exception taken.

A. From A. B. Railton and John G. Nagel.
Q. What sort of a conveyance if any to those lots did you get from Nagel and Railton?

Objected to for the reason that the written conveyance or document is the best evidence.
Objection overruled.
Exception taken.

A. I leased it for 99 years for a certain sum or consideration with the understanding that when he got a title to the place and if the government put in a townsite that it would get a warranty deed for the lots.
348 Q. Can you identify the lots you leased on contestants exhibit "D"?
A. Yes sir. Lots No. 1 and 2 in block "C."
Q. How long did your buildings remain on lots 1 and 2 in block "C" on exhibit "D"?
A. The front portion of my building is now on the back portion of the lots 1 and 2 in block "C."
Q. When did you remove your buildings from the front portion of lot 1 and 2 in block "C"?
A. I think we started in July 1894.
Q. Why did you move?
A. I had a notification from the railroad company.
Q. What right had the railroad company to notify you to move?
A. They claimed they had 200 feet right of way.
Q. When you leased these lots from Nagel and Railton did you know that they were on the railroad right of way?

Objected to as immaterial and incompetent.
Objection sustained.
Exception taken.

A. I did not.

Q. When you erected your buildings did you know these lots were on the right of way?

Same objection, same ruling, same exception.

A. No sir.

Q. Do you know of your own knowledge that the land covered by contestant's exhibit "D" is also covered by the forty acres in controversy?

349 A. Well, I know that part of it is.

Q. Well, what part?

A. The corner stake of the forty in dispute that is the N. W. corner is about 300 feet west of my place of business, my place of business is on this disputed forty, that leave about 300 feet from the south line of the contestants exhibit "D" on this disputed forty running in a northerly direction.

Q. What was the character and value of the buildings you erected on this land in 1889?

A. One two story building 20x40, cottage 15x30, one residence 10x16, some other out houses value about $800.00.

Q. Have you made any improvements in your buildings since 1889?

A. Yes sir I built another story and a half building that is used for carpenter shop value about $400, also a residence improved about $100.

Q. Did you have any other improvements on this land?

A. Yes sir I had it improved with picket fence, I built a barn since that and a corral. I have fruit trees planted there.

Q. Upon what lots according to Exhibit "D" are your fruit trees planted?

A. On lot 14, in block "C."

Q. Were there any other places of business in Clarks Fork when you moved there in 1889?

A. Yes sir John G. Nagel had a post office and general store that was all that I remember of.

350 Q. what places of business were there in Clarks Fork on the land in controversy prior to November 1895?

A. At different times prior to 1895 the following were in business there, Alick Asseline had a saloon there, Kelly and Massey had a saloon there, Carp. Wilson had a carpenter shop, George Roberts had a store, restaurant, hotel and saloon, Mrs. Thibadeau had a post office, J. G. Vinton & Co. had a general merchandise store, A. B. Railton had a general merchandise store, Butler Bros. had a saloon, hotel and butcher shop, Hop Lee had a laundry. Mrs. — had a boarding house, Hoey had a barber shop, that is all I remember of.

Q. Do you know who were engaged in business at Clarks Fork on the identical land in controversy on or about the 26 day of February 1892?

A. Yes sir. Butler Bros. has a saloon and hotel. George Roberts had a saloon and hotel, John G. Nagel & Co. had a general merchandise store and the post office, that is all I can remember that I could swear to.

Q. What is the character of this land in controversy is it mineral or non mineral?

A. It is non-mineral.

Q. Has it ever been claimed or worked for mineral?

A. Not to my knowledge.

Q. What sort of a point is the town of Clarks Fork situ-
351 ated upon this land in controversy with reference to business?

Objection sustained.

Exception taken.

A. It has been a mining center and it is not a very good point for business just now.

Q. What sort of a place was it for business in 1889?

A. Very good.

Q. What sort of a place was it in 1890?

A. Just about the same as 1889.

Q. What sort of a place was it in 1891?

A. About the same as 1890.

Q. What sort of a place of business was it in February 1892?

A. It was fair.

Q. By what sort of a population is Clark Fork surrounded?

Objected to as immaterial and irrelevant.

Objection sustained.

Exception taken.

A. Principally farming, some prospecting, some railroading, some working in the timber.

Q. What were you engaged in and where were you living when John E. White came to Clarks Fork?

A. The same occupation as I am in now living on the land in dispute.

Q. What did Mr. White do when he first came to Clarks Fork?

A. He was working for the Northern Pacific Railroad Company.

352 Q. Where did his family live?

A. They did not come there for some time after him then they lived in the depot.

Q. Do you know when he moved on the land in controversy from the depot?

A. I have forgotten the date I didn't take particular notice of it.

Q. Did Mr. White ever set up to you or in your presence any claim to the land in controversy upon which your buildings were situated?

A. Not to my knowledge.

Q. When you moved your buildings off the Northern Pacific right of way did Mr. White notify you not to move them on to the land where you did move them?

A. No sir.

Cross-examination:

Q. As late as the month of August 1895 was it not your intention to enter this forty in dispute as a homestead?

A. I made several remarks to a dozen people to that effect to satisfy their curiosity.

Q. Isn't it true that after the plats of the public survey of this land had been sent to the land office and during the 30 days of the publication of the time for filing said plats didn't you claim the forty acres in dispute as a homestead?

Contestant objects to the foregoing question for the following reasons.

First. As not being proper cross examination not responsive to any thing brought out in the examination in chief.

353 Second. That the evidence sought to be elicited is immaterial and irrelevant for the reason that the intent or the action or the claim of this occupant or any other individual occupant of the land in controversy would have no binding force upon the occupants of the land in controversy acting through the probate judge as their trustee.

Objection overruled.

Exception taken.

A. I have said that if anybody was entitled to that land as a homestead I was, but I had already signed the petition to have a townsite.

Q. Well shortly prior to the filing of the township plats of that land office did you not claim the forty acres in dispute for homestead purposes?

A. Well I never claimed it but I made inquiries in regard to it.

Q. Did all of those people whom you mentioned as having lived and done business prior to the year 1885 at Clarks Fork on this disputed land live there or do business there at the same time?

A. No sir.

Q. Then meant that they had been there at different times from the time you went there till the year 1895?

A. Yes sir.

Q. Do you remember the date when you got notice to

354 move off of the Northern Pacific right of way at Clarks Fork?

A. I do not.

Q. Prior to your receiving that notice from the railroad company didn't you have and hold a lease from them for the premises then occupied by you?

A. I never received a lease from the railroad company, they gave my brother a receipt for ten dollars permitting them to stay there for a year from March 1893 to March 1894, the lease expired and they gave us notification to move then they extended it to thirty days longer.

Q. Were you and your brother engaged in business together at that time and place?

A. Yes sir.

Q. After your term had expired for that portion of the right of way occupied by you didn't you apply to the railroad company for a further lease of the place?

Objected to as immaterial and irrelevant, and not proper cross examination.

Objection overruled.

Exception taken.

A. Yes sir.

Q. After you had received notice from the railroad company to move off of the right of way didn't you sue Nagel for the money you had paid him on the lots he had leased you?

A. No sir. I sued him after I found out I had to pay the
355 railroad company for the land and after I had received the receipt and permit from the railroad company.

Q. What month and year were these suits brought?

A. It was in 1893.

Now at this time the hearing in this case was continued until tomorrow morning, February 25th at 9 o'clock a. m.

Now on this 26th day of February, 1896, both the —— being present in person and with their respective counsel the cross examination of JOSEPH BUTLER was continued as follows:

——. How long and how wide was the lot upon which your business building was situated before you moved off of the right of way?

A. I had ninety feet front by 110 deep.

Q. In which direction did your buildings face?

A. Towards the railroad track.

Q. How far did the front of your building stand from the track?

A. The front of the buildings were 115 feet from the center of the main track.

Q. How long were these buildings?

A. Forty feet, the main building ten feet the extension on the back thereof.

Q. That was the longest building you had was it?

A. Yes sir.

Q. How many fruit trees have you on your place there?

A. About ten on this piece of 90x110.

356 Q. Are they on the right of way?

A. No sir.

Q. When were they set out?

A. I planted four of them I think in 1893, the others I think were planted in 1894.

Q. When was the first time that you knew that your buildings were situated on the right of way?

A. I think it was in 1893 the railroad company told us we were occupying the right of way.

Q. You didn't move off until after the strike in 1894 did you?

A. I was notified to move off before but did not move until after the strike.

Q. Didn't you, Whitcomb and Nagel after the strike in 1894 undertake to run White out of the country?

Objected to as immaterial and irrelevant, and incompetent.
Objection overruled.
Exception taken.

A. No sir never thought of such a thing.
Q. Do you know the editor of the Hope Examiner?

Objected to as immaterial, irrelevant and incompetent and not proper cross examination. If the counsel asks questions outside of the examination and on the line that he has started out he can prove that by his own witness, and if he is permitted to pursue this course we ask that *that* the testimony be his own and that he be bound by it and pay for it.

Objection overruled.
357 Exception taken.

A. Yes sir.
Q. In the month of August 1894 at the town of Clarks Fork, Idaho didn't you say to said editor that White claimed this whole forty meaning the forty in dispute?
A. Not that I remember of.
Q. And didn't you also tell him that White was nothing but a damn scab and ought to be run out of the country?
A. I don't remember of ever making such an expression against Mr. White it is very seldom I use such language against anybody.
Q. Don't you know that it was commonly reported about Clarks Fork as early as the spring of 1892 and from that on till the date of Whites filing that he intended to enter as a homestead the forty upon which his house is situated?
A. I know that he intended to take a ranch where his residence was built.
Q. As early as the latter part of 1889 didn't you know that the Northern Pacific Railroad Company and was entitled to as right of way 200 feet on each side of the track commencing from the center of the track?
A. I heard three or four different decisions in regard to it. I heard one decision that was sent in that they only had 100 feet and another decision that they had 200 feet and another that they only had 100 feet, in my recollection at that time after I had
358 leased this property from John G. Nagel and A. D. Railton.
Q. In 1889 at Clark- Fork Idaho didn't S. R. Catlow show you a letter written by the commissioner of the General Land office at Washington, D. C. to him, Catlow, in which it was stated that the Northern Pacific Railroad Company by virtue of its charter was entitled to 200 feet on each side of the track commencing from the center of the track?
A. To my personal knowledge he did not. He may have shown it to my brother but I have no recollection of ever seeing it.

JOSEPH BUTLER.

Subscribed and sworn to before me this 26th day of February, 1896.

——— ———, *Register.*

JOHN G. NAGEL being called and sworn testified on behalf of the contestants as follows:

Q. State your name, age, residence and occupation.

A. John G. Nagel, age thirty-seven years, residence Clarks Fork Idaho, occupation merchant, farmer and mill man.

Q. How long have you lived at Clarks Fork?

A. Since August, 1882. I have lived there continuously since that time.

Q. What business if any did you engage in when you first went there?

A. I was getting out railroad ties and telegraph poles on the south side of the Clarks Fork river.

359 Q. Where did you live at that time with reference to the land in controversy?

A. On the south side of the river.

Q. Was there any town at Clarks Fork in 1882?

A. No sir.

Q. Where is your place of business with reference to the land in controversy?

A. It is located on the forty in contest north of the railroad track.

Q. How long has your place of business been on the land in controversy?

A. Since 1884.

Q. What other places of business if any were on the land in controversy when you moved there in 1884?

A. There was none.

Q. What business did you engage in at this point in 1884?

A. Saloon, store and farming.

Q. What was the value and character of your business building in 1884?

A. It was a frame building cost probably $300.

Q. About how much stock did you carry at that time?

A. Probably $300.

Q. Where was your building situated with reference to the Northern Pacific railroad track?

A. About 115 feet from the north center of the main track.

360 Q. Did you know at the time that your place of business was on the right of way?

A. I did not.

Q. How did you understand the right of way to be at that time?

Objected to as immaterial and irrelevant.

Objection sustained. Exception taken.

A. 100 feet from the center of the main track.

Q. Have any other parties engaged in business at Clarks Fork on the forty acres in controversy since 1884, if so give their name and occupation if you can.

A. Yes, sir. Butler Bros. went into the saloon business and hotel business in the spring of 1889, Mr. Roberts went into the saloon and restaurant business in the summer of 1889, the Owen Bros. went into the hotel business in 1890, Mr. Geo. Roberts erected

a two story hotel building in 1891, also a store building and a residence. In 1890 Butler Bros. erected a butcher shop and barber shop, and some chinamen started a laundry. 1890 Butler and Grenough also erected a two story saloon building, in 1889 Mr. Butler put up a small building for a restaurant prior to putting up his saloon building, and during the year 1890 and 1891 there was a number of small out buildings erected. In 1891 J. F. Vinton erected a story and a half residence, and other small out buildings, in 1890 in the spring William Huston erected a one story frame building for a residence. In 1890 I enlarged my business house, and
361 in 1895 Whitcomb Bros. and Nagel constructed a two story building for a general merchandise store and public hall.

Q. Have any of the business men you mentioned resided and done business continuously on the land in controversy since they first moved there, if so state whom.

A. Yes sir, myself, Geo. Roberts and Joseph Butler.

Q. Who are engaged in business there at the present time?

A. Whitcomb Bros. & Nagel, Geo. Roberts, Joseph Butler Carpenter Wilson engaged in carpentering.

Q. What sort of business point is the town of Clarks Fork which is situated on this land in controversy?

Objected to as immaterial and irrelevant.
Objection sustained. Exception taken.

A. For its size a good one.

Q. About what is the value of the stock in trade which you carry?

A. About five thousand dollars general merchandise.

Q. What is the character of the resources supporting the business men of Clarks Fork?

Objected to as immaterial and irrelevant.
Objection sustained. Exception taken.

A. It is farming, stock raising, mining and lumbering, also more or less railroad trade.

362 Q. What is the nearest town to the town of Clarks Fork?

A. Hope, Idaho, en miles distant.

Q. What sort of a point has Clarks Fork been for business since you settled there?

Objected to as immaterial.
Objection sustained. Exception taken.

A. Prior to 1889 owing to the sparcely — population was not of a great value since 1889 with the mining excitement and farmers stock raisers and population increasing in general and business improved accordingly.

Q. About how many people are now living on this land in controversy?

A. Between forty and fifty I think.

Q. How long have they been living there?

A. Some of them since 189 and some of them came there later; I have been there since 188.

Q. Have you a school house at Clarks Fork?
A. Yes sir.
Q. About how many scholars attend that school?

Objected to as immaterial and irrelevant it not having been show that the school house was on the land in dispute.
Objection sustained.
Exception taken.

A. Between fifteen and twenty enrolled.
Q. Where is the school house situated with reference to the lan in controversy?
363 A. It is probably 500 feet west of the west line of the lan in controversy.
Q. Where is the school house situated with reference to contes ants Exhibit "D"?
A. A little west of block "B."
Q. Was the school house built on land claimed by you?
A. Yes sir at the time it was. I donated the lots.
Q. When was the first school established in Clarks Fork?

Objected to as immaterial and irrelevant.
Objection sustained. Exception taken.

A. I think it was in 1890.
Q. Where was it held?
A. In a little log building on the north side of the railroad trac about 500 feet west of the tract in controversy.
Q. Where was the school next held?

Objected to as immaterial.
Objection sustained. Exception taken.

A. In the building erected by Butler & Greenough on the nort side of the track on the land in controversy.
Q. State if you had the original town-site platted and laid off int blocks and lots and if so when.

Objected to as immaterial and irrelevant.
Objection overruled. Exception taken.

A. I did. In the spring of 1889.
Q. For what purpose was the town platted?
364 A. To accommodate the business then demanded.
Q. Did you, when this plat was made, contestant's exhib "D," know that part of it was on the Northern Pacific right of way

Objected to as immaterial and irrelevant.
Objection sustained. Exception taken.

A. I did not. I had nearly all the ground covered by said pla under fence and cultivation for five years previous to the plattin of it.
Q. Does this original plat contestants exhibit "D" embrace an part of the land in controversy?

Objected to as immaterial and irrelevant.
Objection sustained. Exception taken.

A. All of the tract in controversy north of the railroad track except a small portion in the N. E. corner.

Q. Where are the business buildings of Whitcomb Bros. and Nagel now situated with reference to the land in controversy?

A. About two hundred and ten feet north from the center of the railroad track, on lot 1 in block 10 as shown by contestants exhibit "A."

Q. When did you erect your present business building?

A. In the summer of 1895.

Q. Did John E. White the contestee at any time notify you not to erect these buildings on the land in controversy?

A. No sir.

365 Q. When did you move your old store building off the Northern Pacific right of way?

A. After the completion of the new one,I think in September, 1895.

Q. Did John E. White the contestee at any time notify you not to move your old store building on to the land in controversy?

A. No sir.

Q. Are you a citizen of the United States?

A. Yes sir.

Q. How long has this settlement been known as the town of Clarks Fork?

Objected to as irrelevant.

Objection sustained. Exception taken.

A. It was made a flag station on the Northern Pacific railroad by that name in 1883.

Q. Has there been a postoffice there ever since the station was established?

Objected to as immaterial and irrelevant.

Objection sustained. Exception taken.

A. The postoffice was established in 1886 and has continued ever since under the name of Clarks Fork. It has been on the land in controversy all the time.

Q. Has the school been continued ever since 1890?

A. There was a term every year.

Cross-examination:

Q. Do you claim to reside on this forty in dispute?

366 A. No sir.

Q. Have you now a homestead filing on land adjacent to this forty in dispute?

A. Yes sir.

Q. Isn't a part of the land covered by your homestead entry platted by you into lots and blocks?

Objected to as immaterial, and irrelevant and not proper cross examination.

Objection overruled. Exception taken.

A. I think a small portion is.

Q. Didn't you also have a part of an odd or railroad section platted into lots and blocks?

Objected to as not proper cross examination, immaterial and irrelevant.

Objection overruled. Exception taken.

A. The plat I believe also covered a small portion of what proved to be railroad land at the time the United States survey was made in 1893.

Q. Did you have these lands platted and laid off into town lots for the purpose of private speculation?

Same objection. Same ruling and same exception.

A. Not entirely. I laid it off into town lots to accommodate the business.

Q. Did you grant leases for the term of ninety-nine years to divers persons for money considerations for these lands?

Same objection, same ruling, same exception.

A. I did.

Q. Isn't it a fact that Whitcomb Bros. and Nagel, of
347 which firm you are a member, claimed to own an interest in every house and buildings upon this forty in dispute with the exception of that claimed or owned by John E. White and Geo. Roberts?

A. No sir.

Q. How many buildings situated upon that disputed forty other than those claimed by Roberts and White are there in which Whitcomb Bros. and Nagel or Whitcomb personally or Nagel personally do not claim to own an interest in by mortgage, lease or otherwise?

A. There is a building owned by Butler & Grenough that we have no interest in.

Q. Isn't that a little deserted house on the Northern Pacific right of way?

A. It is a two story building located on the right of way and used at present as a carpenter shop.

There is another building belonging to Snow and Brodock that we have no interest in—it is located on the Northern Pacific right of way.

We have no interest in the Butler buildings they are not on the right of way but are on the tract in dispute. We have no interest in the residence building belonging to Mr. Edwards. It is on the tract in dispute and not on the right of way.

We have no interest in the building belonging to Pete Larson, it is on the disputed tract, but not on the right of way.

Q. Then do you own an interest in all of the other buildings which you have not mentioned excepting those of Roberts and
348 White which are situated on the tract in dispute?

A. I think so.

Q. Please mention the buildings used as business places which are

now situated upon this disputed forty and not upon the right of way, giving the dates when they were placed there.

A. Joseph Butler saloon and hotel placed there in August or in September, 1894.

Whitcomb Bros. and Nagel store buildings in August, 1895. Post office placed there in October, 1895.

That is all the business buildings.

Q. Please mention the residence houses now situated and occupied upon the forty in dispute which are not upon the right of way giving the dates they were placed there.

A. The dwelling occupied by Mrs. Lloyd placed there in 1891, a dwelling occupied by Mrs. Lloyds placed there in 1891, a dwelling house occupied by Quillet erected in 1890, a dwelling house belonging to Mr. Roberts partly located on the right of way, erected in 1890, it was partly off the right of way, a residence occupied by Mr. Hasselroth and his family placed there in August, 1896.

A residence occupied by the family of Mr. Butler placed there in 1894.

A residence occupied by Mr. Edwards and his family placed there in October or November, 1895.

369 A residence occupied by Mr. Pete Larson erected in January, 1896.

The family of Mr. Whitcomb resides on this forty acre tract in a house erected in March or April, 1891.

The residence of Mr. White erected in the summer of 1891.

The back portion of the post office is occupied by the postmistress as a residence.

Q. Doesn't the section line run through the dwelling of Whitcomb leaving a part of the dwelling on the forty in dispute and a part on an odd section?

A. Not to my knowledge.

Q. Do you mean by that you don't know whether it is or not?

A. I don't.

Q. As late as 1895 was it not your intention to include this forty in your homestead entry?

Objected to as improper cross examination, and immaterial as his intention has nothing to do with the issue in this case.

Objection overruled. Exception taken.

A. It was until I learned that the land was not subject to the homestead laws on account of having been used for trade and business.

Q. On or about the 20th day of April 1895 in the depot at Clarks Fork didn't you state to Mr. White that if would permit your partner Whitcomb to file a homestead on the forty in dispute it would settle the land controversy?

Objected to as inadmissable incompetent and irrelevant
370 that an offer to compromise or settle is not a matter that is susceptible of proof in this or any other action.

Objection overruled. Exception taken.

A. No I do not. On or about the 20th day of April 1895 at the depot at Clarks Fork, Idaho, in a conversation with Mr. White did you ask Mr. White to permit your partner Whitcomb to file a homestead upon a strip of land running through the 160 acres which would include about ½ of this forty in dispute or words to that effect.

Objected to as incompetent and inadmissible from the fact that homestead of the character described in the question cannot be made on government land to divide the smallest subdivision or to divide a lot, and if such proposition was made it contemplated an unlawful act and therefore not binding.

Objection overruled. Exception taken.

A. I did not. I am not asking permission.

Q. On or about the 20 day of April 1895 at the depot in Clarks Fork, Idaho, in the presence of Compton White did you not request John E. White to permit your partner Whitcomb to enter a portion of this disputed forty as a homestead?

Same objection. Same ruling. Same exception.

A. I did not.

Q. Didn't you or your firm hold or some member thereof hold a lease from the Northern Pacific railroad company for the ground upon which your business house was situated as late as in 1896?

371 A. Yes sir.

Q. How long had you held such a lease?

A. I think it was from 1893 to 1895, to the end of the year 1895.

Q. When did you move your building off that right of way?

A. A portion of it was in August 1895 and the remainder later on in September or October 1895.

Q. As early as the spring of 1893 didn't you know that John E. White claimed this forty in dispute together with other lands as a homestead?

A. I did not.

Q. Wasn't it generally known and reputed in and about Clarks Fork, Idaho, from the 26th day of February 1892 till White made his entry that he claimed this disputed forty together with other lands as a homestead?

A. Not to my knowledge.

Q. Did you take the Hope Examiner a weekly newspaper during the month of August 1894?

Objected to as not proper cross examination, and immaterial and irrelevant and not competent.

Objection sustained. Exception taken.

A. Our firm I believe was at that time a subscriber to the Hope Examiner.

Q. Don't you know that during the mont- of August 1894 an editorial appeared in the Hope Examiner which stated that John E. White claimed all of this disputed forty as a homestead?

Objected to as improper cross examination and incom-
372 petent as evidence because if true it was hearsay and does not prove or tend to prove anything at issue in this case. In that the Contestee White wrote said editorial or that he owned or controlled said paper is not shown.

Objection overruled. Exception taken.

A. I do not.

Q. Never heard of such an editorial did you?

A. No sir.

JOHN G. NAGEL.

Subscribed and sworn to before me this 26th day of February, 1886.

——— ———, *Register.*

HERMAN VOGEL being called and sworn testified as follows on behalf of the contestant:

Q. State your name, age and residence, and occupation.

A. Herman Vogel, age thirty years, residence Clarks Fork, Idaho, occupation a farmer.

Q. How far do you live from the town of Clarks Fork?

A. About two miles. I do not live on the land in controversy.

Q. How long have you lived there, at and around Clarks Fork?

A. Ever since 1884.

Q. What have you been doing during that time?

A. Part of the time I was working out and part of the
373 time ranching. I have been ranching nearly six years.

Q. Were there any business houses at Clarks Fork when you went there in 1884, if so state whom?

A. Yes sir. Mr. Nagel had a store and a saloon.

Q. Have there been any other parties engaged in business on the land in dispute since then, if so state whom?

A. George Roberts, has a saloon and hotel and a store, Butler has a saloon, Whitcomb and Nagel has a general merchandise store Joseph Butler has a butcher shop, that is about all the business houses there.

Q. Have these men engaged continually in business on this disputed land?

A. Yes sir.

Q. What sort of a settlement is there in and around Clarks Fork?

A. A good settlement composed of ranchers, lumber men, mining men.

Q. Where do the people living in this settlement do their trading and get their supplies?

Objected to as irrelevant and immaterial.

Objection sustained. Exception taken.

A. Most all of them at Clarks Fork.

Q. Is there a post office at Clarks Fork?

A. Yes sir.

Q. Where do you get your mail?
A. At Clarks Fork.
Q. Is there a school at Clarks Fork?
A. Yes sir.
374 Q. Where do your children attend school?
A. They are not old enough to attend school, but I int
to send them to Clarks Fork next winter.
Q. How long have you received your mail at Clarks Fork?
A. Ever since 1884.
Q. How long has that place been known as the town of Cl
Fork?
A. Ever since 1884.

HERMAN VOGE

Subscribed and sworn to before me this 26th day of Febru
1896.

——— ———, *Regist*

Now at this time the contestant by his attorney announces tha
rests his case.

Now at this time comes contestee by his attorney R. E. McFarl
and moves that this contest be continued and dismissed for the
lowing reasons.

First. That the evidence herein is insufficient to warrant the
cellation of contestee's said entry.

Second. That there is no evidence of the existence of any
townsite upon the tract in dispute.

Third. That there is no testimony that any application to
said tract of land or any part thereof was ever made or attem
to be made in accordance with the laws of the United States in
cases made and provided.

Fourth. The evidence does not show any proprietary
375 right or settlement on the part of the alleged townsite cl
ant or inhabitants.

Fifth. The testimony plainly shows that at the time cont
commenced the construction and erection of his dwelling on
premises and moved therein that said disputed tract of land was
occupied held, or claimed by any one whatsoever either for
poses of business townsite, or personal entry.

Sixth The testimony shows that this was instituted for the
pose of enabling John G. Nagel and the firm of Whitcomb Bros
Nagel of which said John G. Nagel is a member to secure the l
herein involved for private speculative purposes.

Contestant alleges that the motion should not be granted as
evidence plainly shows that the year 1884 and continuously u
this time the land in controversy has been used for the purpos
legitimate trade and business, and that the fact has at all times
well known to the contestee.

Now at this time the register and receiver after duly conside
said motion denied the same.

To which decision and denial the contestee by his attorney
excepts.

Now at this time the contestee in this case called GEO. ROBERTS who being duly sworn testified on behalf of contestee as follows:

Q. State your name, age, residence, and occupation.

A. Geo. Roberts, age thirty-six years, residence Clarks
376 Fork, Idaho, occupation merchant and hotel keeper.

Q. How long have you resided there at Clarks Fork?

A. I have resided at Clarks Fork since July 1889.

Q. Are you the Roberts whose name is mentioned in the affidavit of contest filed herein?

A. Yes sir.

Q. Are you acquainted with John E. White the contestee and if so how long have you known him?

A. I have known John E. White for four or five years.

Q. Are you acquainted with the land in dispute and if so how long have you known it?

A. Yes sir. I have known it for the last six years.

Q. Do you remember the circumstances of contestee's building a house upon that forty?

A. Yes sir I do.

Q. When was it built?

A. Five years ago.

Q. Do you remember the time that he moved into said house?

A. Yes sir, not the date exactly.

Q. Was that house built upon the land in controversy?

A. Yes sir.

Q. At the time John E. White moved into that house did any one else occupy or claim any part of that disputed forty excepting such portion of it as is included in the Northern Pacific?

377 A. No sir nobody claimed it or occupied it.

Q. What was the character of that forty at time Mr. White settled upon it?

A. It was heavily timbered with fallen logs and standing timber.

Q. What kind of timber was it?

A. It was mostly dead timber tamarack and white pine.

Q. How long had White lived in that house commencing from the time he first moved into it?

A. I don't remember the date it is something like five years.

Q. Has contestee a family and if so of whom does it consist?

A. Yes sir, wife and five children.

Q. Where have they resided since he built that house?

A. Upon this same forty that is in controversy in the house built by him, with the exception of a short time that the land was under water, it drives him out nearly every spring, it is not a fit place for a townsite.

Q. Isn't that forty divided or intersected by the Northern Pacific company's right of way?

Objected to as leading.

Objection overruled.

Exception taken.

A. Yes sir.

Q. In what manner is it divided?

378 A. The railroad runs a little catacornered through it.

Q. Now of that forty, upon which side of the track does the greater portion lie.

A. Upon the south side where Mr. White lives.

Q. Is that portion of the disputed forty lying south of the railroad track occupied by any one else than Mr. White, aside from those living on the right of way and if so by whom?

A. There is a part of Mr. Whitcomb's house on the disputed forty on the south side of the track.

Q. Then does any one else besides Whitcomb and White live upon that portion of the disputed tract south of the railroad track?

A. No sir.

Q. How far is Whitcomb's house from White's house?

A. Between three and four hundred yards I should judge.

Q. Is all of Whitcomb's house on the disputed forty?

A. No sir, its partly on a railroad section.

Q. What kind of a house has White on this land in which he is living?

A. He has a very substantial house about 24x24, it is a frame building with five rooms, it is papered and it has brick chimneys, windows and doors, out buildings such as woodshed stable and pig pens, all surrounded with a fence.

Q. How much land has White under fence there?

379 A. He has about forty acres under fence.

Q. How much of this disputed forty if any is included within that fence?

A. I should judge from 15 to 20 acres.

Q. Has White any live stock upon that place?

A. Yes sir, he has three cows, one heifer, some thorough bred brood sows and a boar, he has twenty-three pigs that I know of.

Q. Has he any fruit trees and if so how many?

A. He has something like 180 fruit trees.

Q. How many of these fruit trees if any are on the disputed forty?

A. They are all on the disputed forty.

Q. How much clearing has White there altogether?

A. About 12 acres.

Q. How much of that clearing is on the disputed forty?

A. 7 or 8 acres I should judge.

Q. How much land has he in cultivation there altogether?

A. Everything that he cleared up is under cultivation.

Q. How many crops if any has White raised on that place?

A. Four or five crops.

Q. Has he any other improvements in the way of fruit trees shrubbery that you have not mentioned?

A. He has some shrubbery berry bushes, etc., some cross

380 fences picket fences dividing off his pastures, his garden, etc.

Q. Is any part of these improvements, buildings, fences, fruit trees, shrubbery clearing, garden or other things which you have mentioned on the right of way of the Northern Pacific railroad Co.

A. No sir he did have a line of fence on the right of way, all his improvements are off the right of way.

Q. On which side of the railroad track are all these improvements that you have mentioned?

A. On the south side.

Q. Taking into consideration the condition of the land at the time White settled upon it, what is it worth per acre to clear the land and put it in cultivation as it now stands?

A. $200.00 an acre.

Q. Who did the most of this clearing?

A. Mr. White, his boy and his wife?.

Q. State whether or not it was commonly reputed and known in and about Clarks Fork from the 26th day of February 1892, whether that White claimed this disputed forty for homestead purposes?

A. Yes sir it was notorious. Most everybody was talking about it that White claimed the earth.

Q. State how many business houses there are on this disputed forty at the present time?

A. There is two.

Q. How many different families other than that of Mr. White and Whitcomb are now residing upon the disputed forty ex-
381 clusive of those located upon the right of way?

A. Three families to the best of my knowledge.

Q. On what side of the railroad track are those two business houses and three families which you have mentioned located?

A. On the north side.

Q. On the 26th day of February 1892 was there any business houses or residences other than those located upon the Northern Pacific right of way situated upon the forty in dispute?

A. No sir there was not any business houses and to the best of my knowledge no residence or dwelling houses except Mr. White's. There might have been some empty cabins, the Chinese put up cabins in early days.

Q. Where is your place of business situated.

A. My place of business is situated in Clarks Fork on the railroad right of way.

Q. Have you owned any dwelling or other business houses there in Clarks Fork other than those situated upon the Northern Pacific right of way?

A. No sir, my entire buildings are on the right of way and have always been on the right of way, except my water closet.

Q. When was that water closet moved on there?

A. Since I have been notified by White that he claimed the land.

Q. Examine this plat marked contestee's exhibit "A" and see whether it is a correct plat and map of the Northern Pacific
382 right of way upon this forty in dispute as it stood December 20, 1892.

A. Yes sir it is a correct map.

Q. Now contestee offers in evidence said exhibit "A."

Objected to because it does not appear who made this map, and is

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therefore hearsay and does not purport to be a correct map of
part of the land in dispute, and does not purport to be any su
or to have been made by any person qualified to make a survey.

Objection overruled and the map marked contestee's exhibit
admitted in evidence. To which ruling the contestants duly
cepts.

Q. Do you know who got up this map?

Objected to for the reason:

First. That no ground has been sought to be laid for the intro
tion of this exhibit.

Second. That the ground should have been laid before offe
it in evidence and

Third. That after having submitted it and the register and
ceiver have taken action upon its introduction and rendered a
cision thereon and exception thereto has been taken by contest
counsel it is too late now to lay a ground for its introduction a
having been passed upon and Contestant's counsel objects to any
dence sought to be based thereupon because any such evidence wo
be hearsay as this offered plat is a child without parentage and ha
even a legal father.

383 Objection overruled. Exception taken.

A. Yes sir, Mr. Faust the railroad engineer.

Q. Designate the building where Whitcomb Bros. and Nagel
business till they moved off of the right of way.

A. In the house marked J. F. Vinton on this plat.

Q. State whether or not shortly after the strike in the fall of 1
M. P. Whitcomb made any proposition to you concerning the r
ning of White out of the county, and if so state that conversation

Objected to by counsel for contestants for the following reas
The evidence sought to be introduced is immaterial, it is irr
vant and incompetent, it does not show or tend to show any ma
at issue in this controversy.

Second. It does not show or tend to show the fact as to whet
or not any portion of the land in controversy was occupied for p
poses of trade or business by any person or persons prior to and
to the date of the filing of contestee's homestead entry, it does
show or tend to show whether or not any persons were residing u
the land in dispute prior to and up to the date of filing the s
homestead, the testimony sought to be introduced can have no b
ing upon nor be considered in summing up the testimony whic
to decide the issues of this case.

Objection overruled. Exception taken.

A. Yes sir, along about the 5 of August, 1894, while I was sta
ing talking with Mr. Whitcomb he, M. P. Whitcomb, said it l
with you as to whether we will run that son of a bitch
384 a scab out of the country or not.

Cross-examination:

Q. When did you first see Clarks Fork?
A. Twenty years ago.
Q. Did you stop there?
A. On my way through there.
Q. Where were you going and for what purpose?
A. I was going to Montana, looking for work.
Q. How long did you stop at Clarks Fork?
A. Just stopped over night, just camped there.
Q. Was any business carried on at Clarks Fork at that time?
A. Not that I remember of.
Q. What month was it?
A. It was in the fall, I don't remember what month it was, of course I was through there long before there was any town there, I was through long before the railroad was built through there.
Q. Were there any houses in Clarks Fork at that time?
A. There was a log house near the river, I don't remember that there was any house where the town of Clarks Fork is.
Q. When were you there next?
A. I was through there as engineer on the railroad off and on for five years prior to the day I settled there permanently which was in July, 1889.
Q. When did you first see a house in Clarks Fork on the tract in dispute?
385 A. If I remember rightly, seven years ago of seeing one little log house on the right of way at Clarks Fork on the forty in dispute.
Q. Was that house occupied?
A. Yes sir, it was. They run a small store in the place.
Q. Was that the only house on the land in dispute in 1889?
A. No sir, it was not.
Q. Well, state what houses were there in 1889 and how they were occupied and by whom.
A. The Butler Bros. built a saloon, I built a building for myself a saloon, Mr. Nagel had a store there.
Q. Are those all the buildings that were on the land in 1889?
A. No sir.
Q. State what other buildings were on that tract of land in 1889.
A. To the best of knowledge I cannot state whether there was any other buildings there or not, I don't remember.
Q. Have those several business houses which you have mentioned been occupied as business houses by these several persons named by you from 1889 to the present time continuously?
A. Yes sir, they have.
Q. Where did you build your business house?
A. On the right of way that I leased from Mr. Nagel.
386 Q. For what term of years did you rent from Mr. Nagel the land that you built upon?
A. For ninety-nine years.
Q. Did Mr. Nagel rent you land on the railway company's right of

way for ninety-nine years, and did you take such lease from him for such land and for such term of years?

A. Yes sir, I did take such lease from Mr. Nagel.

Q. What did you pay or offer to pay for that leasehold, and when and how were payments to be made?

A. I paid him $70 all in advance for the whole term.

Q. Did Mr. Nagel claim to have any lease from the railroad company or any right to lease you land upon the railroad company's right of way at the time you took your lease from him?

A. He was to give me a deed when he proved up on the land he claimed that *that* was his ranch.

Q. I again repeat the former question and ask an answer.

And I object to that question and all other questions of that character as being irrelevant and immaterial and not proper cross examination and ask that the costs of reducing the same to writing be taxed against the contestant in this case.

Objection sustained. Exception taken.

387 Witness further answers that Mr. Nagel claimed that as his ranch and I leased it from him and paid him the cold money for it.

Q. Examine contestants' exhibit "D" and state whether the land which you leased from Nagel appears upon that plat and if so how is it designated thereon?

A. This plat does not resemble the plat that I was shown when I bought the town lots. I will state that I remember I leased block "B" that is lot 4 and 5 in block "B."

Q. Are the lots 4 and 5 in block "B" which you leased from Nagel designated on this plat the same as described in your lease?

A. I don't recognize the plat.

Q. Was a plat shown you by Mr. Nagel before you leased, upon which the lots and the block which you leased were marked and designated?

A. Yes sir, there was.

Q. Was Nagel at the time you leased claiming that platted ground that he showed you as a townsite?

A. He claimed it as a ranch.

Q. Examine contestants' exhibit "D" and say whether that is the plat shown you and whether the lots and the blocks which you leased are properly designated thereon?

A. I cannot swear that it is or not. I can't swear that them lots are designated there at all.

Q. Was the plat shown you by Mr. Nagel at the time you leased so platted and marked as that the land you leased was on this disputed forty or not?

388 Contestee objects to that question and all questions of the same character and to the answers thereto as being irrelevant and immaterial and not proper cross examination and invokes rule 41 of the rules of practice and asks that the register and receiver decide whether such question is obviously irrelevant and in the event that it is decided to be that they summarily put a stop to the same and tax the costs thereon against the contestant herein.

he contestant here states that this is the only question that will sked at this time.

nd the register and receiver under that statement overrule the ection of contestant and allow the question to be answered and the s thereof taxed to the contestee.

o which ruling the contestee duly excepts.

. Yes sir.

. Did you at the time that you leased from Nagel know that of the land leased by you was on the railroad company's right ay?

. No sir, I did not.

. How far from the center of the track each way did you think the right of way extended?

. I had no idea how much land they claimed.

. Was it generally believed by the citizens of Clarks Fork that right of way was only one hundred feet from the center of the k and not 200 feet, before notice was served on them by the com- y?

A. Yes sir it was.

Q. Upon what portion of the disputed land is Mr. White's house?

. It is on the south of the railroad track.

. Examine contestants' exhibit "A" and say whether or not the e of White is properly designated as to location upon said map.

. I rather think it is.

. Is there a county road upon any portion of this disputed forty ?

Yes sir, there is.

Is it properly designated and located on said exhibit "A"?

To the best of my knowledge it is.

When was that county road established?

Three or four years ago, it is still a county road.

Is that road fenced?

There is poles laid up along, I would call it a fence.

Is there a fence designated by red line on this plat which rep- ts a partial enclosure and what lands other than that in this forty in dispute are enclosed in that fence?

jected to as immaterial and irrelevant and not proper cross ex- ation.

jection sustained. Exception taken.

It includes part of an adjoining forty.

Does this fence together with other natural barriers enclose the of land which you have testified that John E. White claimed or occupied?

A. It encloses part of the land that Mr. White claimed on this disputed forty.

I wish you would describe the course and extent of that fence the county road and along the railroad company's right of way ts connection with natural barriers and the amount of land en- thereby.

A. It runs along the county road down to the river, and down along the railroad track to the river, to the best of my knowledge there is about forty acres embraced therein.

Q. About how much of that forty acres is the land in dispute?

A. Between fifteen and twenty acres.

Now at this time the hearing in this case was continued until tomorrow, February 27, 1896, at 9 o'clock a. m.

Now on this 27 day of February, 1896, both parties being present in person and with their respective counsel, the cross examination of GEO. ROBERTS was continued.

Q. Were both those fences on the county road built at the same time?

A. I don't know.

Q. Who built these fences?

A. I don't know.

Q. When was the surveys made the plats of which are now on file in this office?

A. I don't remember.

Q. Can't you state the year?

391 A. No sir, I don't remember.

Q. Did Mr. White move into his house before or after the field work of that town-ship survey was made.

A. He moved in before the survey was made.

Q. What portion of Whitcombs house mentioned in your testimony is on the forty in dispute?

A. The Northeast part of the house.

Q. How much of it?

A. About two-thirds of the house I should judge.

Q. Does that section line strike the main part of his residence or a little summer kitchen?

A. I can't say for sure.

Q. Is section 2 upon which the land in dispute is situated subdivided and the corners of the forty in dispute marked?

A. I don't know.

Q. Do you know where the boundaries of the forty in dispute are other than the west side which is a section line?

A. I do not.

Q. Is any portion of the disputed forty seeded to timothy or any other grasses?

A. Yes sir there is.

Q. What part of it?

A. A part of White's claims is seeded to clover.

Q. Is that all?

A. That is all that I know of.

Q. Was the portion of this forty in dispute around and in

392 the vicinity of the lots you leased from Nagel seeded at the time you leased?

A. It looked like wild clover. I don't know whether it was seeded down or not.

Q. Was the portion of this forty to the north and east of your leased lots seeded in the same manner at the time you leased?

A. I don't remember.

Q. Wasn't it all cleared with the exception of stumps at that time all north of the track?

A. It was not.

Q. What portion of the land north of the railroad track was cleared off and seeded.

A. The railroad right of way was cleared off. I can't say if it was seeded.

Q. Was the portion of this forty which was platted on the plat shown you by Nagel, at the time you leased, seeded to timothy and clover?

Objected to as immaterial and irrelevant.

Objection sustained. Exception taken.

A. I do not remember.

Q. Will you swear that no portion of the land platted on contestant's exhibit "D" with the exception of what is on the north of said company right of way was seeded to timothy and clover, at the time you leased from Nagel?

Same objection, same ruling. Same exception.

A. I stated that I can't remember if it was seeded, I do not remember.

393 Q. Isn't it a fact that Whitcomb's house the main building is entirely on the forty in dispute and that the section line runs through a summer kitchen in the rear of his house leaving about 2 feet of the corner on the section west of the line?

A. I know that the section line crosses the house, I don't know how much of the house is on each side of it.

Q. Wasn't that house of Whitcomb's south of the railroad track and the portion of it on the disputed forty built before White's house?

A. No sir, it was not.

Q. What lands on the disputed forty has White occupied at any time prior to filing his homestead entry?

A. Occupied that portion on the south side of the railroad track.

Q. Has he occupied any portion of it on the north side?

Objected to as immaterial and irrelevant for the reason the possession or occupancy of a portion of a forty acre tract which constitutes a legal subdivision in itself is possession or occupancy of the whole thereof. Counsel for the contestant enters their protest against contestee's counsel asking such statement as the foregoing, the only object of which can be to suggest a technical answer of the witness to the question.

Objection sustained. Exception taken.

394 A. He did for a time live in the depot with his family on the north side of the disputed tract on the disputed forty.

Q. Is not the depot on the right of way?

A. Yes sir.

Q. Has he occupied any portion on the north side not on the right of way?

The same objection. Same rul-ng and the same exception.

A. Not that I remember of.

Q. Has he at any time occupied any portion off of the right of way on the south side and west of the county road?

Same objection. Same ruling. Same exception.

A. Not that I know of.

Q. Who has occupied that portion described in my last question?

Objected to as assuming that some one else than White has occupied when in truth that fact has not been shown; the witness has not stated that any one else occupied it.

Objection sustained. Exception taken.

A. Mr. Whitcomb.

Q. How do you know that Mr. White claimed the forty in dispute as a homestead since February 26, 1893?

A. He told me that he did.

Q. When, where and in presence of whom did he tell you so?

A. He told me in my own place of business in the presence of my clerks Al. Sherwood, also down at his own place thousands
395 of times he has told me two or three years ago, it was notorious, everybody knew it.

Q. How many thousand times?

A. I will say a thousand times.

Q. When did he tell you so at your place of business?

A. Three years ago. I can't make no mistake because he told me every day.

Q. Did he tell you so in February, 1892, at the time that he went from the depot onto this tract where he now resides?

A. I can't say that particular day, he did.

Q. In whose presence?

A. Nobody was present except myself.

Q. Where was this conversation?

A. In my place of business.

Q. How many times did he tell you prior to May 1893?

A. A good many times I kept no record of it.

Q. How many times did White tell you so in 1892 after he moved into his house?

A. Several times.

Q. Well about how often?

A. A good many times, he talked of nothing else scarcely.

Q. Then that was his principal business was it from 1892 up to 1893 to talk about his claim to that land?

396 Objected to as immaterial. Objection sustained. Exception.

A. That was a greater part of his converastion.

Q. While he was asserting to you to the forty in dispute from February 1892 to May during which time it was the principal part of his conversation with you did you inform Nagel, Whitcomb Bros. or either of them, Butler Bros. or either of them, Mr. Vinton, Mr. Huston, or any other person residing upon the disputed tract that White claimed that forty as a homestead?

A. I do not remember?

Q. Upon — 66 of this testimony you have stated that the high water drives White out nearly every spring, during what months of spring is White compelled to leave his residence and how many spring- since he has resided there has he had to leave his home?

A. I don't remember but once that the high water drove him out. I don't remember the month.

Q. When was that spring?

A. I have no recollection, I can not say.

Q. How deep was the water at his place at the time he was driven out?

A. From 6 to 8 foot, I should judge.

Q. Was not that unusually high water that drove him out?

A. It was.

Q. Did the water come into White's house and if so to what depth?

397 A. It did, it was three or four feet in the house.

Q. Did the high water get into Whitcomb's house?

A. Yes sir, I don't know the depth. It drove them out.

Q. Did it come into your house?

A. No sir it did not.

Q. Have any of the persons doing business in Clarks Fork at any time since you have known it been driven out of their place of business by high water entering their place of business?

A. No sir I could swim in my house but I did not move out.

Q. What year was that?

A. I don't remember.

Q. Has the high water to your knowledge ever been over in Nagel's or Whitcomb's or Butler's place of business?

A. Not that I know of.

Q. How long was Whitcomb compelled to stay out of his home on account of high water?

A. I don't remember.

Q. You have stated on page 66 that Clarks Fork is not a fit place for a townsite. Is it a fit place to do business at?

Objected to for the reason that the witness has not testified that the town of Clarks Fork is not a fit place for a townsite.

Objection overruled. Exception taken.

398 A. We do business there yes it is a fit place to do business.

Q. Is not it as good a point for business as the average towns of the same size around the country at the time of this financial depression?

Objected to as immaterial, irrelevant and not proper cross-examination.

Objection sustained.

Exception.

A. Yes sir I think it is.

Q. Since you first went there haven't you from time to time increased your stock, enlarged and improved your business because of increased demands of trade?

Objected to as immaterial and irrelevant. Objection sustained. Exception taken.

A. Yes sir I have.

Q. Is not the same true with regards to the other business houses at Clarks Fork?

Same objection. Same ruling. Same exception.

A. Yes some of them were successful.

Q. Are any part of your buildings or enclosures on the land in dispute and off of the right of way?

A. No sir my buildings are all on the right of way. I have an enclosure on a portion of the tract in dispute back of my buildings that is off of the right of way, and according to contestant's exhibit "D" would be lots 12 and 13 of block "B" a part of these lots are on Nagel's homestead claims.

399 Q. What improvements have you on these two last described lots?

A. I have fruit trees and shrubbery.

Q. Is that fenced in connection with your business place?

A. Yes sir.

Q. Do you know Tom Greenough?

A. Yes sir he has taken out ties at Clarks Fork for the last 3 or 4 springs.

Q. Did he lease lot or lots on the disputed tract from Nagel?

A. Not that I am aware of.

Q. Did you not tell Joe Butler in the office of A. G. Avery an attorney at Spokane, Washington during the trial of Greenough, Butler, Roberts, and others in the fall of 1893 that it was a shame that we did not know the Northern Pacific railroad company was entitled to 200 feet right of way on either side of their track for if we had known it we could have built 85 feet further back and been on our own dung hill?

Objected to as irrelevant.

Objection sustained. Exception taken.

A. Yes sir I did.

Q. Have you any interest in the result of this contest?

A. No sir.

Q. Was J. F. Vinton living in Clarks Fork in 1893 when White moved into his house?

A. I don't remember that he was.

Q. Is it not a fact that at the time that White moved into
400 his house that Vinton was living in a house on the north side of the railroad track and not on the right of way?

A. I don't remember.

Q. Can you state that he was not?

A. I don't remember.

Q. Is it not a fact that William Huston was living in a house on the north side of the track on land in dispute and not on the right of way when White moved into his house.

A. Don't remember that he was.

Q. Did Butler have a residence separate and apart from his place of business on the north side of the track on the land in dispute and not on the right of way when White moved into his house?

A. No sir.

Q. Did he have such a residence there in 1889 or any time up to the time White moved into his residence?

A. Not that I know of.

Q. Will you swear that Mr. Butler did not reside in a house separate and apart from his place of business on the north side of the track and off the right of way yet on land in dispute from the fall of 1889 up to the time that he prepared to move his business house back of the right of way and that in preparing to move, he moved his residence further back to a location still on land the land in dispute and that his business house as it now stands is where his residence stood prior to his moving off of the right of way?

401 A. I don't remember of any buildings being back there at all.

Q. Did he not have a residence there as stated in my last question and did not tear that residence down in order to make way for his business house off of the right of way?

A. I do not remember.

Q. Wasn't this Chinese laundry in Butler's old residence, north of the right of way and not in a cabin built by the Chinamen?

A. I do not remember.

Q. Can you state that it was not in his old residence?

A. No sir I cannot.

Q. Was Mr. Vinton a married man and did he have a family of children and did he reside upon the land in dispute with his family in May, 1893?

Objected to as immaterial. Objection sustained.
Exception taken.

A. Yes sir I think he did.

Q. Of what did his family consist and how long had he resided there?

A. I do not remember what his family consisted of or how long he resided there.

Q. Was residing there in February 1892?

A. I do not know.

Q. Was he residing there at the time that White moved into his residence?

A. I do not remember.

Q. Is Mr. Vinton there now?

402 A. No sir.

Q. Does your memory serve you correctly on that point?

A. Well he was not there the other day.

Q. When did he leave Clarks Fork?

A. I don't know my memory is not good on dates.

Q. How many children were there in the Vinton family.

A. I do not remember.

Q. Did you know William Huston?

A. Yes sir.

Q. When did he move away from Clarks Fork?

A. I don't remember.

Q. Had he a family there?

A. No sir.

Q. Is Mr. Butler a married man?

A. Yes sir.

Q. Is Mr. Butler's family living at Clarks Fork?

A. Yes sir.

Q. How long has Butler and his family resided at Clarks Fork?

A. Something like seven years.

Q. What portion of that time have they resided on and what portion off of the right of way?

A. I do not know.

Q. Are you a married man and does your family reside with you in Clarks Fork?

A. Yes I am a married man. My family does not reside with me at Clarks Fork.

Q. Where does your family reside?

403 A. I do not know.

Q. Have they ever resided at Clarks Fork?

A. Yes sir. I just have a wife, we separated at Clarks Fork. I do not remember the date.

GEO. ROBERTS.

Subscribed and sworn to before me this 27th day of February, 1896.

—— ——, *Register.*

M. P. STEPHENS being called and sworn testified on behalf of contestee as follows:

Q. State your name, age, residence and occupation.

A. N. P. Stephens, residence Hillyard, Wash., age forty-two years, occupation practicing law and publishing a newspaper.

Q. Are you acquainted with John E. White and if so how long have you known him?

A. Yes sir I have known him since 1890.

Q. Are you acquainted with the forty acre tract in dispute and if so how long have you known it?

A. Yes sir, I have known it since the fall of 1889.
Q. Where were you living in 1889?
A. I moved to Clarks Fork in November, 1889.
Q. How long did you live there?
A. From that time until May, 1892.
Q. Do you know when White's dwelling house was built upon the forty in dispute?
A. Yes sir, it was in the spring of 1891.
Q. Who built the house?
404 A. My brother and myself.
Q. For whom?
A. For J. E. White.
Q. At the time you built that house, was there any other house or building of any kind upon that portion of the disputed forty lying south of the railroad track, other than those situated upon the Northern Pacific right of way.
A. Not at the time we commenced building or for some time after we commenced it.
Q. While you were building that house did Whitcomb have any lumber upon the disputed forty?
A. Not at the time we commenced it he did before we completed it.
Q. When did White move into that building, if you know?
A. I do not remember the exact time, it was quite a while after we had it completed.
Q. At the time White moved into the house was there any other house or building located upon that forty lying south of the right of way, if so what?
A. No except Whitcomb's. He had a house there but was not living in it.
Q. When was this Whitcomb house erected with reference to the time White's house was erected?
A. We started to build White's house before Whitcomb started to build his and I remember that Whitcomb had a gang of carpenters come there and built his house in the meantime; we
405 were rather slow in building White's house on account of other work on our hands.
Q. State how much if any of White's house had been built before Whitcomb moved his lumber upon the ground?
A. All of the foundation was up, including sills and joists.
Q. State whether or not while engaged in building White's house you had any conversation with Whitcomb with reference to building his house and if so state that conversation.
A. No not in relation to building Whitcomb's house.
Q. Was Whitcomb living in his house when White moved into his on this forty?
A. No he was living in boarding cars if I remember correctly.
Q. Where were those boarding cars being operated?
A. Sometimes at Clarks Fork, sometimes at other places along the line; he worked his crew of men between Missoula, Montana, and Hope, Idaho.
Q. At the time White had moved into his house was there any

other house or building upon that portion of the forty lying south of the right of way other than Whitcomb's house?

A. No sir.

Q. What was the character of the land upon which White built his house?

406 A. Timbered, heavily timbered, some of it down and some standing, mostly all dead timber.

Q. How far is White's house from the Clarks Fork river?

A. I should think about eighty rods. I never measured it.

Q. How far is Whitcomb's house from the White house?

A. About twenty rods.

Q. Describe the house that you built for White on that forty?

A. A frame building one story, 30 feet square, having I think six rooms in it on a foundation 2 feet above ground.

Q. What was that house worth as it stood, when you knew it?

A. It seems to me about $600 would cover the cost of it.

Q. At the time that White moved into this house was there any store house, saloon, restaurant, hotel or any other business house situated upon that portion of the disputed forty lying north of the Northern Pacific right of way?

A. No sir there was not.

Cross-examination.

Q. When did you move to Clarks Fork?

A. Some time about the first of November, 1889.

Q. How long did you remain there?

A. Until about the first of May, 1892.

407 Q. What business were you engaged in while there?

A. Most any thing that I could earn an honest dollar at.

Q. Were you practicing law while there?

A. Yes sir.

Q. When you went there were any business houses on the land in dispute; if so state whose they were and what they were.

A. None except those on the right of way.

Q. What business houses, if any, were at that time on what is now known to be the Northern Pacific right of way?

A. Hop Lee's laundry, Butler Bros.' meat market, Butler Bros.' hotel and saloon, Nagel & Co. store and postoffice, Geo. Robert's hotel and saloon; that was all that was there then.

Q. How far were these business houses from the Northern Pacific track?

A. About one hundred feet north of the track.

Q. State if you know how wide the Northern Pacific right of way was at that time supposed to be by the business men at Clarks Fork?

Objected to as immaterial, irrelevant and incompetent.

Objection sustained. Exception taken.

A. I do not know except what I learned from communications. the communications I saw in Mr. Catlow's hands from purported authority, and it was the general talk of the town, everybody

408 seemed to be discussing it, everybody seemed to be satisfied that it was 200 feet each side of the track.

Q. Was that the general opinion based upon the communication you saw in Mr. Catlow's hands?

A. Not altogether. Inquiries were made from different sources, I understand.

Contestant's attorney here moves that the two last answers of witness be stricken out, that they are hearsay.

Motion denied. Exception taken.

Q. How long after you moved to Clarks Fork was it before the citizens generally believed that the Northern Pacific right of way was 200 feet wide and not 100 fet on each side of the track?

A. Sometime after, during the winter we used to talk about it sitting around the fire places.

Q. Do you know that this was the general belief at the time these business buildings were erected?

A. I didn't live there, consequently I don't know.

Q. Do you know the boundaries of the forty acres in dispute?

A. I should say I do know the land and I know the official map when I see it.

Q. To what map do you refer?

A. Contestant's exhibit "A."

Q. Have you been on the ground since the public survey has been made?

A. Yes sir.

Q. Did Mr. White occupy or cultivate any part of the
409 forty acres in dispute prior to the public survey north of the railroad track?

Objected to as immaterial and irrelevant and for further reason that occupancy and possession of one portion of a legal subdivision of forty acres is necessarily occupation and possession of the entire forty or subdivision.

Objection sustained.

Exception taken.

A. No sir, he didn't.

Q. Did Mr. White when he was building his house in 1891 claim any part of the forty acres in dispute north of the railroad?

Same objection that if he claimed part he claimed all.

Objection sustained. Exception taken.

A. I don't know exactly what limits he claimed more than this that he was determined to file a homestead entry on that land subject to the government survey.

Q. Do you not know that when you went to Clarks Fork in the fall of 1889 John G. Nagel had part of the land north of the railroad track and north of the right of way surveyed into blocks and lots for a townsite?

Objected as irrelevant and immaterial.

Objection overruled. Exception taken.

A. I do not know. I was told he did.

Q. Do you not know that business houses and residences
410 had been erected at that time on lots leased from John G. Nagel?

A. I was told they were.

Contestee objects to the answer as hearsay and asks to have it stricken out..

Objection overruled. Exception taken.

Q. Was it not generally known and reported around Clarks Fork?

Objected to as hearsay and immaterial and irrelevant.

Objection overruled. Exception taken.

A. Yes, it was generally reported.

Q. Did you not see John G. Nagel's plat of the townsite?

Objected to as immaterial and irrelevant.

Objection sustained. Exception taken.

A. You used to see one that Railton had. He was a partner of Mr. Nagel's at the time.

Q. When you first began the construction of White's house was not the lumber for Whitcomb's house on the land where Whitcomb afterwards built?

A. We had the foundation of White's house up before the lumber was brought up for Whitcomb's house in my recollection of it.

Q. Was there any dispute at that time between White and Whitcomb as to their respective claims to this land?

A. I think not, they were all good natured people then.

Q. Was there any fence between their claims?

411 A. Yes some sort of a pretended fence that was put there years before not by either of them.

Q. Was that old fence recognized by White and Whitcomb as a boundary?

Objected to as immaterial and irrelevant and for the further reason that it has not been shown that witness knows whether it was so recognized.

Objection sustained. Exception taken.

A. I can't say definitely, believe it was.

Q. When White moved into his house had Whitcomb's house been completed.

A. I don't know whether it was completed or not, I was never inside of the house.

Q. Was it not occupied at that time?

A. There was some old Montana man living there at that time temporarily.

Q. What was that man doing?

A. I can't tell you.

Q. Was he not taking care of Whitcomb's premises, chickens and stock, and working on and improving the plate for Whitcomb?

Objected to as irrelevant and immaterial.

Objection sustained. Exception taken.

A. I do not remember.

Q. What time in 1891 did you commence work on White's house?

A. We commenced early in the spring to cut off cedar blocks, that was the first work we did, the blocks were for the sills to rest on, and I remember at that time there was little heaps of snow still re-
412 maining where we cut the blocks, the exact date I don't remember without the aid of memoranda.

Q. Will you swear that you commenced White's house prior to May 1, 1891?

A. Yes sir.

Q. How long prior?

A. I think we commenced work in March, I am not certain about it.

After being shown a contract for building of the house witness answers that he commenced the first part of April, a few days after the contract was signed.

Q. What sort of a point was Clarks Fork which is situated on the land in controversy for business in 1889?

Contestee objects to said question and any further questioning on that subject as being obviously irrelevant under the rules of practice and not proper cross examination, and ask the register and receiver to put a summarily stop to such questionings and to tax the cost of all such questions and answers thereto to the Contestant.

Objection sustained and the testimony allowed to go in the record at the sole cost to the Contestant.

Exception taken, and protests against charging the fees to Contestant.

A. As a mining camp it had a brilliant prospect then, it has died out since then.

Q. Was it not a distributing point for ranchers, miners, timbermen, and railroad men in that vicinity?

413 Same objection and same request. Same ruling and same exception and protest.

A. It was in a small way.

Q. What was the condition of the land in dispute north of the railroad track and north of the right of way in 1889?

A. It was partially cleared, the timber had been cut off and taken away. And it seemed to me it had been seeded to timothy and used for a ranch.

Q. Were there any residence houses erected on the land in dispute and north of the right of way prior to 1891?

A. I can't remember whether Billy Huston's house was built that winter or not; if it was it was the only house there. Vinton's house was built in 1891, the same spring that White's house was built.

M. P. STEPHENS.

Subscribed and sworn to before me this 27 day of February, 1896.

——, *Register.*

H.A. BROWN being called and sworn on behalf of contestee and testified as follows:

Q. State your name, age, residence and occupation.

A. H. A. Brown, age thirty-six years, residence Hope, Idaho, occupation at the present time in the dray business and contracting.

Q. Are you acquainted with John E. White and if so how long have you known him.

414 A. Yes sir, I have known him since 1890.

Q. Are *you* acquainted with the tract in dispute, and if so how long have you known it?

A. I have known it since October, 1890.

Q. Did you ever live at Clarks Fork and if so when and how long?

A. Yes, sir, I had a residence at Clarks Fork from sometime in 1891 till 1894.

Q. Do you remember the time White moved into his house on this disputed forty?

A. No, I was not at Clarks Fork the time he moved in.

Q. Do you remember the circumstances of his house being built upon that forty?

A. Yes sir.

Q. At the time his house was being built was there any other house or building upon the disputed forty south of the Northern Pacific right of way?

A. There was not.

Q. Which commenced the construction of his house first, Whitcomb or White on this forty?

A. White.

Q. How many houses are at the present time located upon that portion of this disputed forty lying south of the Northern Pacific right of way?

A. Two houses and out buildings.

Q. Who occupies them?

A. John E. White occupies one, and N. P. Whitcomb the other.

Q. How far those two houses apart?

415 A. Between two and three hundred feet.

Q. Is all the Whitcomb house upon the disputed forty?

A. No there is a portion of it on the railroad land west of it.

Q. How many business houses are there now on this disputed forty other than those upon the right of way?

A. Three that I know of.

Q. Was there any business houses on this disputed forty other than those on the right of way on the 26, day of February 1892?

A. No sir.

Q. On the 26 day of February was there any dwelling houses upon this disputed land excepting those on the right of way and Whitcomb's and White's house?

A. One that I know of.

Q. What house was that and where was it located?

A. It was Vinton's, located back of Vinton & Co. store.

Q. Was it occupied on the 26 day of February, 1892, and if so by whom?

A. I don't know whether it was occupied or not.

Q. Do — remember the circumstances of his moving out of that house?

A. I do not. I remember the circumstances of his moving but not the date.

Q. How long after Vinton moved out of that house before any one else moved in?

416 A. I do not know when Vinton moved out of the house, but the house was vacant until spring of 1894.

Q. Do you mean that it was vacant from the time Vinton moved out of it till 1894?

A. Well it was vacant all the winter of 1893 until the high water in the spring of 1894.

Q. Did Butler ever have a residence on that disputed forty off of the right of way, and if so at what time?

A. No sir.

Q. Do you know when these buildings that you have testified now stand upon this disputed forty and off of the right of way were placed in their present position?

A. I do. In the summer of 1895.

Q. State what buildings these three are.

A. One building is owned by Whitcomb Bros. and Nagel and I suppose the other two are owned by Joseph Butler.

Q. I desire to refresh your memory with reference to the time Butler's building was moved off of the right of way to its present site and ask you to state whether or not it was during the late strike or shortly after?

Objected to as leading. Objection overruled.

Exception taken.

A. I will say positively that I was mistaken in the date, it was moved in the spring of 1894 instead of 1895.

417 Q. Which of those business houses were removed there in 1895 and which in 1894?

A. Whitcomb Bros. and Nagel built their house in 1895, Butlers buildings were moved in 1894.

Q. What improvements has John E. White upon this forty in dispute?

A. He has about six acres under cultivation, a five room house worth about 6 or 7 hundred dollars, a stable and hog house, chicken house, root house, and wood shed.

Q. What is fair estimate of the value of the stable, hog house, chicken house, root house, wood shed altogether?

A. About two hundred and fifty or seventy-five dollars.

Q. What if any live stock has he upon those premises?

A. He has three yearlings, I think twenty-seven head of hogs and pigs.

Q. How much land has he cleared upon this disputed forty?

A. In the neighborhood of 6 or 7 acres.

Q. How much fencing if any on this disputed forty and what kind of fencing?

A. He has a fence on the west side, woven pickets and wire posts and rails for about two hundred and fifty or three hundred yards.

Q. What kind of crops if any has he raised upon this disputed forty?

A. All kinds of garden vegetables, wheat, and it is now
418 seeded to clover and about 150 or 175 fruit trees; the fruit trees are worth about $200 and he has some berries in his garden, I don't remember just the extent of them.

Q. How much of White's homestead claim is under fence?

Objected to as immaterial. Objection overruled. Exception.

A. I never measured the ground but I think he has fifty or sixty acres under fence.

Q. How much clearing has he there altogether?

A. About ten or twelve acres.

Q. What was the character of that land that has been cleared before White cleared it?

A. It was heavily timbered with white pine, cedar, cottonwood and alder brush, principally dead timber, more than one half down.

Q. What was it worth per acre to clear it and put it in cultivation, as has been done?

A. About seventy-five dollars an acre.

Q. Who did the work of the clearing?

A. John E. White, his son Compton, and Mrs. White done the principal part of it; I sent some men to clear some for him he employed one other man for a short time that I know of.

Q. Is John E. White a married man, and if so of what does his family consist?

A. He is a married man. His family consists of himself, wife and five children.

419 Q. Where has he and his wife and children resided since the 26 day of February, 1892?

A. In the house now occupied by him on the disputed forty with the short exception of time he lived in the depot during the high water.

Q. Do you know what land White claimed at the time he moved in to this house?

A. I do.

Q. State what.

A. He claimed 160 acres in a square including the forty that his house was built on subject to the government survey.

Q. Did you have any conversation with Mr. White at or about the time Whitcomb was clearing the ground for his house with reference to the land claimed by White? If so state that conversation.

Objected to as it has not been shown that this conversation took place in the presence of any of the residents of Clarks Fork who now claim the same for townsite purposes and is therefore not binding upon them.

Objection overruled. Exception taken.

A. No I didn't.

Q. Did Whitcomb ever ask you to do any clearing on the site of his home, and if so when was that?

Objected to as leading.

Objection overruled. Exception taken.

A. He did. It was in the spring of 1891, sometime in the fore part of April, say the 10 or 16.

Q. Now at or about that time did you have any conversation
420 with Mr. White in which he stated to you what land he intended to claim and if so state that conversation.

Objected to as immaterial and further as it does not appear that White's declaration were made in the presence of any of the parties represented by the contestant in this proceeding and therefore not binding upon them.

Objection overruled. Exception taken.

A. I did. Mr. Whitcomb asked me in the presence of Mr. White if I would clear some ground for him to build on; I asked him when he wanted it cleared, he said some time during the spring; I told him I couldn't do it then. After Mr. Whitcomb went away I asked Mr. White what if you and Whitcomb are both on the same forty after the survey, what would you do about that, White said, why I should certainly hold the land that my improvements are on I said what the whole forty he said the whole forty because I am the oldest settler on it, and I can prove that by you, I said if this land crosses the track what will you do about it, he says I shall hold whatever land my 160 embraces according to the government survey.

Cross-examination:

Q. Where were you on February 26, 1892?

A. I couldn't swear positive just where I was on that date. I was doing business at Cabinet, about 8 miles from Clarks Fork.

Q. What business were you engaged in?

421 A. Contracting ties.

Q. What proportion of the time from 1891 to 1894 did you spend at Clarks Fork?

A. I was in and out of town probably once or twice a week, that was my postoffice and my freight bills I settled there.

Q. Do you know when Mr. White commenced building his house?

A. Yes sir, very near the time, the lumber was hauled on the ground in March 1891, I helped to haul it, and the ground was cleared in a few days afterwards I helped to clear it.

And about the first of April 1891 I was on the ground to help cut some trees so they — not fall on the house and the foundation was laid at that time and the sills and the floor joints were in their place.

Q. Do you know when Whitcomb commenced building his house?

A. I do not know the date.

Q. Was Whitcomb's house in course of construction when White's house was commenced?

A. There was no structure of any kind when I was there at Whites place when his foundation was laid there was no lumber there other than White's at that time.

Q. Had not the ground where Whitcomb's house was built at this time been cleared, plowed, and the lumber on the ground for the house?

A. No sir.

Q. When you went to Clarks Fork in 1891 how many
422 business houses were being conducted and state whose and what character?

A. There was George Roberts saloon and lodging house, J. G. Nagel a general merchandise store, and Butler Bros. a saloon, and I believe J. G. Nagel had the postoffice in his store. There is one building west of Roberts but I wouldn't say positively whether it was occupied then or not, if so it was by Kelly and Massey as a saloon.

Q. Where were these business houses situated with reference to the land in dispute?

A. All on the Northern Pacific railroad company's right of way about one hundred feet north of the railroad track.

Q. Did you know that they were on the Northern Pacific railroad company's right of way at that time?

A. I did.

Q. How much of the disputed forty was enclosed or cultivated by Mr. White prior to the public survey?

A. I should judge about three acres cleared, and I do not remember whether there was any under fence or not he had a fence on the right of way.

Q. Was any of the disputed forty north of the railroad track and off of the right of way enclosed or cultivated by White at any time prior to the public survey?

Now at this time in order to avoid cross-examination on the point and to avoid prolonging this trial contestee admits that he has
423 never done any fencing, clearing or cultivating on that particular portion of the forty in dispute lying on the north side of the Northern Pacific Company's right of way.

Q. Did Mr. White at any time prior to the public survey occupy any part of the forty in dispute north of the Northern Pacific railroad?

Objected to as immaterial and irrelevant and for the reason that witness has testified that he claimed and occupied and now resides upon the forty in dispute and that possession and occupancy of a portion of a legal subdivision of forty acres is possession and occupancy of the whole thereof.

Objection sustained. Exception taken.

A. He claimed to occupy it but he never lived on it.

Q. When did he claim to occupy it?

A. In the spring of 1891.

Q. How did he claim to occupy it?

A. He claimed to occupy the land across the track he said as his 160 would certainly take it in.

Q. Was that the only way he claimed to occupy it?

A. That was the way he told me he occupied it.

Q. Did White at any time prior to the public survey occupy or cultivate any part of the forty in dispute south of the railroad track and west of the county road?

A. He did not occupy or cultivate any of it that lies west of the public road.

424 Now at this time the hearing in this case was continued until tomorrow, February 28, 1896, at nine o'clock a. m.

Now on this 28 day of February, 1896, at 9 o'clock a. m. both parties being present in person and with their respective counsel the cross examination of witness BROWN was proceeded with as follows:

Q. What was the condition of that part of the disputed land lying north of the railroad track and right of way in 1891?

A. There was a part of it cleared and grass growing on it; a part of it was covered with bushes and down timber, very little standing timber, I couldn't say how much of it was cleared.

Q. Do you not know that in 1891 John Nagel was claiming the land in dispute north of the railroad as a townsite?

A. No sir.

Q. Did you know that John Nagel had this land north of the railroad surveyed into blocks and lots for town settlement?

A. I heard that he did.

Q. Was that the general report, general talk around there?

A. I heard Geo. Roberts and Butler Bros. say they bought lots from him.

Q. In 1891 were there any residences on this land north of the railroad off of the right of way occupied?

A. I do not know whether there was any occupied or not.

425 Q. Did not John F. Vinton and William Huston live in houses off of the right of way north of the railroad track and on the tract in dispute?

A. I don't know whether they did or not.

Q. Do you know when the public survey of this land was made?

A. I think it was made in the summer of 1893.

Q. Do you know when it was subdivided and the lines of this forty in dispute were run?

A. I do not know.

Q. Do you know the exact location of the lines and corners of the land in dispute?

A. I know very near where the corners are, I could go to them.

Q. Have you ever seen these lines and corners?

A. I have saw two of them. I saw the N. W. and S. W. corner.

H. A. BROWN.

Subscribed and sworn to before me this 28 day of February, 1896.

—— ——, *Register.*

THOMAS J. OWEN being called and sworn testified on behalf of contestee as follows:

Q. State your name, age, residence and occupation?

—. Thomas J. Owen, age forty-five years, residence Clarks Fork, Idaho, occupation, I am a lawyer by profession.

426 Q. How long have you lived in the neighborhood of Clarks Fork, Idaho?

A. I landed in Clarks Fork on the 12 day of May, 1889, and have resided in the neighborhood of Clarks Fork ever since that time.

Q. Are you acquainted with John E. White and if so how long have you known him?

A. I know John E. White. I have known him since 1890.

Q. Do you know the land in dispute and if so how long have you known it?

A. I have known it since May, 1889.

Q. State whether or not any portion of the disputed forty lying south of the railroad right of way was occupied at the time White began the construction of -is house thereon?

A. There was nobody living on that side of the road I believe.

Q. State whether or not any portion was occupied on the 26 day of February, 1892, when White moved into his house?

A. I do not know the date at which either party moved into their houses. I don't think there was any one there when White moved into his house.

Q. Was there any business buildings in this disputed forty other than those on the right of way at the time White settled thereon?

A. There were no business buildings except on the right of way.

Q. Was there any residence houses upon that portion of the
427 disputed forty lying north of the railroad right of way at the time White settled upon this land?

A. I can't say as to that.

Q. How many business houses are there now upon this disputed forty other than those upon the right of way and when were they placed upon their present sites?

A. There are two business buildings. The building of Whitcomb Bros. and Nagel was placed there in the summer of 1895, and the building of Butler Bros. was placed there in 1894.

Q. Is that all the business houses?

A. All but the post office, I believe there is no business transacted there except the mail.

Q. How far is the Clarks Fork river from this disputed forty?

A. I should judge about two or three hundred yards.

Q. What is the course of that river with reference to this disputed tract?

A. It runs south of the forty and in a westerly direction there may be a part of the forty runs to the river on the upper end, I don't know where the upper line is.

Q. How does the land lay along this river with reference to elevation?

A. Generally overflows along that river, I believe in the spring time.

Q. Taking into consideration that this river generally
428 overflows in the spring is this disputed forty a suitable or fit location for a townsite?

Objected to as immaterial and irrelevant and not responsive to any issue in the case.

Objection sustained. Exception taken.

A. Not south of the railroad, I shouldn't think that it is suitable for a townsite.

Q. State whether or not that portion of the disputed forty lying north of the railroad track is overflowed or submerged by the rise of the Clarks Fork river during the spring seasons?

A. Portions were two years ago.

—. State whether or not the N. W. ¼ of this section 2, would be a more suitable site for a town?

Objected to as immaterial and irrelevant and not responsive to any issue in the case.

Objection sustained. Exception taken.

A. I should judge the further you would go north and west the more appropriate place you would find for a townsite.

Yes sir it would be a more suitable place.

Q. How many families at the present time occupy residences upon this disputed forty and off of the Northern Pacific right of way, naming those upon the south and north side of the track?

A. There are three families on the north side, Hasselroths, Butler, and Mrs. Lloyd. On the south side there are the families of M. P. Whitcomb and John E. White, do not know of another family living on this tract.

429 Q. When did these families that reside upon the north side of the right of way in this tract locate there?

A. Well, Mr. Butler located there in 1894, Mr. Hasselroth, I think in 1895, and Mrs. Lloyd, I think came there in 1895.

Q. When was that Butler building built and for what purpose was it used?

A. I think about five years ago it was used by Huston as a dwelling.

Q. What was Mr. Huston doing at that time?

A. Mining and prospecting.

Q. Was he a married man?

A. No sir.

Q. Where is he now?

A. He is over towards the British possessions or was some time ago, he is trapping over there this winter.

Q. How much of the time since the spring of 1891 has this Huston cabin been occupied?

A. I can't say how much of the time I should judge of the time.

Q. Is not a portion of the lot upon which the Huston house is situated on the N. W. ¼ of section 2?

A. Yes sir.

Q. When did you see White's residence last?

A. About five days ago.
Q. What improvements has he there upon this disputed forty?
A. He has a dwelling house worth about 5 or 6 hundred dollars, a chicken house, sheds, and other out buildings, fences, a
430 cellar. The house is surrounded with a fence, there is a garden paled in there.
Q. Has he any clearing or cultivation on this forty and if so how many acres?
A. Yes he has a clearing of about 7 to 9 acres, it is in cultivation, I believe.
Q. Has he any fruit trees on this disputed tract and if so how many?
A. He has fruit trees growing there, I don't know the number except what Mr. White has told me. I never counted the trees.
Q. Has he any live stock there and if so what kind and what number?
A. He has live stock there, he showed me three cows that belonged to him, 2 brood sows, 20 pigs, and some shoats, I don't know how many.

Cross-examination:

Q. When you went to Clarks Fork in 1889, how many and what business houses were there on this disputed forty?
A. One general store of John G. Nagel & Co., Mr. Butler was there, I believe he was in a tent running a saloon.
Q. Were there any other business houses erected and operated on this land in dispute subsequent to May, 1889 and prior to February 26, 1889, if so who were they and what character.
A. Mr. Butler erected a building that same year it was used for a restaurant and saloon I believe, Geo. Roberts erected a building that year for a saloon and restaurant, I think that is all the busi-
431 ness houses that was erected there.
Q. Did not Owen Bros. erect a two story hotel building there?
A. Not on the disputed tract; it is west of Geo. Roberts' place of business and I think on a railroad section.
Q. What was the condition of this disputed forty north of the railroad track when you went there in 1889, as to whether it was cleared or not?
A. There was some land cleared there, probably 2 or 3 acres, the remainder was trees and stumps, some standing, some down.
Q. Has not John G. Nagel since the fall of 1889 claimed this land north of the railroad track as a townsite?
A. I believe he has.
Q. Was not the said Nagel's claim open and notorious in that community?

Objected to as immaterial, irrelevant and incompetent.
Objecton overruled. Exception taken.

A. It was so understood.
Q. Did he not in the spring of 1889 have this land north of the

ailroad track surveyed and laid off into town lots, blocks, streets nd alleys and a town plat of the same made and published?

Objected to as immaterial, irrelevant, incompetent, and cumulative.

Objection sustained.

32 Exception taken.

A. I do not know the date of that survey during that summer, I was in Clarks Fork very little, I was not there at the time his townsite was laid out, all I know about it is what people told me, I never saw a plat of it until I came into this office.

Q. What sort of a point has Clarks Fork, situated upon the land in dispute, been for business purposes and for trade from 1889 up to the present time?

Same objection. Same ruling.

Exception taken.

A. For 1889, and 1891 I would call it a good business place, since that time every thing has been dull in our community.

Q. Is it in your opinion likely to be permanent for business purposes?

Same objection. Same ruling and exception.

A. As to its permanency, I cannot say, I think it would be permanent.

Q. What sort of a settlement is tributary to its business and trade?

The Contestee as before objects to this question as being obviously irrelevant, immaterial and incompetent and ask that such questioning of any and all other witnesses placed upon the stand by contestant, and contestee makes this general objection in order to avoid incumbering the record with further objections in that nature and to avoid costs of the same.

The attorney for contestant here says he is willing to pay for this same testimony but he does it under protest.

33 And the costs thereof is hereby taxed to the contestant.

A. There is quite a lot of ranchers down the valley, that is all I believe.

Q. No miners or any lumber men or any thing of that kind around there?

A. There is some men living there getting out ties. There is no mining there except doing assessment work.

Q. Has not the mines been suspended on account of the low price of silver?

A. I suppose that has something to do with shutting down of all the mines around there, there is only one mine there that has ever shipped any ore and it has only shipped 2 car loads.

Q. Was not the overflow of Clarks Fork river in 1894 unprecedented in the history of the country?

A. Yes sir.

Q. Has much of an overflow ever occurred before or since within the memory of the oldest inhabitants?

A. I have never heard of such a flood being in the country.

—— ——.

Subscribed and sworn to before me this 28 day of February, 1896.

—— ——, *Register.*

COMPTON I. WHITE being called and sworn testified on behalf of contestee as follows:

434 Q. State your name, age, residence and occupation.

A. Compton I. White, age eighteen years, residence Clarks Fork, Idaho, occupation telegraph operator.

Q. Are you a son of John E. White, the contestee?

A. I am.

Q. Where have you resided since the 26 day of February, 1892?

A. I have resided in Clarks Fork on the land in dispute.

Q. Who if any one else has resided with you?

A. My father, mother, two brothers and two sisters.

Q. Has your residence and that of your father, mother and two brothers and two sisters upon that land been continuous?

A. It has been except about two weeks in June, 1894, we moved out on account of high water.

Q. When was your father's house built upon that disputed tract?

A. It was commenced about April the 1st, 1891, and completed in the middle of January, 1893.

Q. At the time it was commenced was there any other buildings upon this disputed forty or that portion of it lying south of the railroad right of way?

A. No sir there was not.

435 Q. When was the residence of M. P. Whitcomb, commenced with reference to commencement to your father's house?

A. It was built one Sunday about two weeks after father's foundation for his house was laid. It was built by a gang of Northern Pacific carpenters.

Q. State whether any one was residing on that portion of the disputed forty lying south of the railroad right of way when your father moved into his house?

A. No sir.

Q. On the 26 day of February 1892 was there any business houses upon this disputed forty other than these upon the right of way?

A. No sir.

Q. On that day was any one other than your father and his family residing upon this disputed forty other than those located upon the right of way. And if so who?

A. J. F. Vinton and family was the only people.

Q. Where did Vinton and family reside and how long did they live at that particular place?

A. They resided in a building about 250 feet from the Northern

Pacific main track north, and twenty five feet south of the Northern line of the forty now in dispute, they lived there from the end of 1892 till the spring of 1893 as near as I can remember.

Q. How long after Vinton moved out of that house was it vacant?

A. It was vacant till M. P. Whitcomb moved there in June 1894.

436 Q. How many business houses are there on the disputed forty at the present time and not on the right of way and when *they were* placed on their present site?

A. There are three, Joseph Butler's saloon placed there in September, 1894, M. P. Whitcomb general merchandise placed there in August, 1895, the postoffice belonging to M. P. Whitcomb placed there in the fall of 1895 that is all the business buildings there.

Q. How many families now reside upon this disputed forty other than those upon the rai*r*load right of way?

A. Five, A. Hasselroth's family, Joseph Butler's family and Mrs. Lloyd's family on the north side of the right of way. M. P. Whitcomb and John E. White's family on the south side of the right of way.

Q. When did Butler move upon his present place of residence?

A. Sometime in September, 1894, I think.

Q. When did Mrs. L*o*lyd move to her present place of residence?

A. About August, 1896.

Q. When did Hasselroths move to his present -lace of residence?

A. About September, 1895.

Q. Have you examined the plat marked Contestant's Exhibit "D" and introduced in evidence in this case?

A. Yes sir I have.

437 Q. Not taking into consideration the blocks and lots designated in that plat which lies upon the railroad right of way state whether or not nearly as much of the land shown to be platted by that map lies upon the S. W. ¼ of the N. W. ¼ of section 2, as lies upon the forty in dispute?

A. Nearly as much.

Q. State whether or not on the 29 day of April, 1895, at the depot or in the depot at Clark's Fork, Idaho, or rather on the railroad track at Clark's Fork near the depot in your hearing, Mr. M. P. Whitcomb made the following statement to your father:

"White, about this land here, are you going to file on it; I was going to file on this forty, but if you are going to file on the whole 160, I will file on the 160 too, and give you a contest."

Objected to by contestant for the following reasons:

First. The question is leading. Second. The evidence sought to be obtained is immaterial and irrelevant and not responsive to any issue in the case. Third. That even if said declaration were made by Whitcomb it is not binding upon him or upon any other occupant of the land in dispute seeking to establish a townsite thereon.

Objection overruled. Exception taken.

A. I did, I heard him make such a statement.

Q. What improvements has your father upon this disputed tract?

A. He has about seven acres of land cleared and under
438 cultivation and fenced, a frame dwelling house 30x30, five rooms papered, painted inside, a shed annexed thereto, a barn and combination pig sty and root cellar, 6x24, a wood shed 30x20, a chicken house, and the land in dispute is subdivided in lots by a picket fence there, about 175 apple trees worth about $2 each; part of the land is seeded down in clover, part to a garden and other cultivation.

Q. What stock has he there?

A. Three cows, one yearling, 2 brood sows, twenty pigs, one shoat and one boar, 24 chickens and a turkey.

Q. How much land has your father cleared altogether on his homestead claim?

A. About ten acres.

Q. How much has he cultivated altogether?

A. About 8 acres.

Q. How many acres of his homestead are under fence?

A. I should judge about 60.

Q. What was the character and condition of this land where the clearing was done when your father settled upon it?

A. It was mostly dead down timber, very heavily timbered, the majority of logs being over 2 foot in diameter, very thick underbrush.

Q. Who performed the actual labor in clearing it?

A. My father, my mother and myself did most of it.

439 Q. State whether or not the overflow of the Clarks Fork river effects this disputed tract and if so how often and of what season?

A. The overflow gets over a part of it every spring to the depth of from 18 inches to four feet, the big overflow of 18-4 covered the entire forty except about 4 acres in the northwest corner; it came up and covered the sidewalks in the town; it has been known to do this before.

Q. State whether or not it was generally known or generally reputed among the residents of the town of Clarks Fork from the 26 day of February, 1892, hitherto that your father claimed all of this disputed forty as a homestead?

A. It was generally known that we claimed 160 acres which included the forty in dispute.

Cross-examination.

Q. In whose employment are you as a telegraph operator?

A. I have not been in the employment of any one as a telegraph operator, I have assisted my father and operated over the wires over the Northern Pacific railroad.

Q. Are you getting a salary from the Northern Pacific railroad?

A. I am not.

Q. How long had M. P. Whitcomb house been vacant when John E. White moved into his house on this disputed forty on February 20, 1893?

440 A. It had been vacant about two months as near as I can judge.

Q. How long had Whitcomb's house been occupied prior to this vacation of the same?

A. About 6 months.

Q. How many residences north of the railroad off of the right of way were occupied on February 26, 1892.

A. One, J. F. Vinton.

Q. In what business was Vinton engaged in at that time?

A. A merchant.

Q. How long had he been living in that residence?

A. I am not positive, it might have been a month or two months.

Q. Has he not been living there since the summer of 1891?

A. I am not positive, he might have moved there in the fall of 1891, but not in the summer.

Q. How long had Vinton been engaged in merchandising at this place?

A. Since the summer of 1891.

Q. On or prior to Feb. 26, 1892, did not William Huston reside on the disputed forty north of the railroad and off of the right of way?

A. William was a miner and lived in the mountains; he used his house at Clarks Fork as a store house for giant powder and such things. He did not reside there, he lived in the mountains.

441 Q. Did he ever live in this house?

A. He sometimes lived there a week.

Q. Where did Butler's saloon stand with reference to this forty in dispute prior to September, 1894?

A. It stood on the Northern Pacific right of way.

Q. How far from the present location?

A. About 75 feet south.

Q. Where did Whitcomb Bros. and Nagel's place of business stand on this disputed forty prior to 1895?

A. On the Northern Pacific right of way, about 100 feet south of its present location.

Q. How many families now remain on the forty in dispute off of the right of way?

A. Five that I know of, John E. White and M. P. Whitcomb on the south, Mrs. Lloyd, Mr. Hasselroth and Mr. Butler's on the north.

Q. Where did Mrs. Tibbedee live.

A. She lives in the postoffice about 60 feet west of Whitcomb's store off of the right of way and on the forty in dispute.

Q. Where does Mrs. Edwards and family live?

A. They live about 200 feet east of the section house on the forty in dispute and off of the right of way.

Q. What part of this forty in dispute overflows every spring?

A. The southeast portion.

Q. How much of the southeast portion so overflows?

A. About three or four acres.

442 Q. How far is that three or four acres from John E. White's house?

A. It begins about 200 feet east of his house.

Q. How far is that three acres that so overflows from the town and business houses of Clarks Fork?

A. About 200 yards.

Q. How many residences are there on this disputed forty at the present time, and on the right of way and how occupied?

A. There is one, the Edwards house, I am not sure whether or not it is on the right of way or not, there is the railroad section house, that is all.

Q. Where does Brock Dougherty and family reside?

A. He lives in the upper story of a house about twenty feet west of Geo. Roberts. I am not sure whether it is on the disputed forty or not.

Q. Has John E. White at any time occupied any portion of the forty in dispute north of the railroad track?

Objected to as immaterial and irrelevant and for the reason that witness has already stated that John E. White resides upon and occupies the portion of the disputed forty lying south of the right of way and possession and occupancy of a portion legal subdivision is occupancy and possession of the whole thereof.

Objection sustained. Exception taken.

A. We pastured our cattle on it, it is not enclosed, our cattle have a free right to run over it.

443 Q. Did not your cattle range generally around the community?

A. Our cattle have ranged at large, but since Mr. Nagel has extended his fence on the north of us this is our main pasture.

Q. Was the running of your father's cattle on that part of the disputed forty north of the railroad his only acts of occupancy of the same?

A. That is all I know of, he has given permission to men to cut wood upon that portion of the railroad track.

Q. When and to whom did he give permission to cut wood on this disputed forty north of the railroad track?

A. He has given permission a number of times; I recall two instances, once to Jassen Edwards in the summer of 1895 and once to W. A. Eplin in the summer of 1895.

Q. Did not the cattle in that neighborhood also range on this forty in dispute north of the railroad track?

A. Some of them did, it was not enclosed.

Q. You have stated in your examination in chief that it was generally reputed at Clarks Fork subsequent to Feb. 26, 1892, that John E. White claimed all the forty in dispute as a homestead. How many persons did you ever hear say that he so claimed it?

A. I have heard some. I do not know the number; M. P. Stephens is one, that is all I remember.

444 Q. Has John E. White at any time occupied, cultivated or enclosed any portion of the disputed forty south of the right of way west of the county road?

A. He cut hay there one year.

Q. What year was it.

A. In the year 1892.
Q. Did he not get permission from M. P. Whitcomb?
A. I do not know.

Redirect:

Q. What was the nature or character of the wood upon that portion of the disputed forty north of the railroad track which your father gave permission to people to cut?
A. It was dead standing timber and down timber.
Q. State whether or not on or about the 29 day of April, 1895, at the town of Clarks Fork within your hearing John G. Nagel asked your father permission for M. P. Whitcomb to file on a portion of the forty in dispute.

Objected to by the Contestant for the following reasons:
First. That it is not evidence in rebuttal of anything brought out in cross examination. Second. That it is immaterial and irrelevant and not responsive to any issue in this case. Third. That if Nagel made such statement it would not be binding on the occupants of this land seeking to establish a townsite thereon.
Objection overruled. Exception taken.

445 A. Yes sir, he did.

—— ——

Subscribed and sworn to before me this 28 day of February, 1896.
—— ——, *Register.*

S. R. CATLOW being called and sworn testified on behalf of Contestee as follows:

Q. State your name, age, residence and occupation.
A. S. R. Catlow, age thirty-nine, residence Clarks Fork, Idaho, occupation a farmer.
Q. Are you acquainted with John E. White and if so how long have you known him?
A. Yes sir, I have known him since the early part of the summer of 1890.
Q. Are you acquainted with the forty acre tract in dispute and if so how long have you known it?
A. Yes sir. I have known it since the spring of 1889.
Q. Do you know how early it was ascertained by the people who lived in and about Clarks Fork that the Northern Pacific right of way at that place was 200 feet on each side of the track, commencing from the center of the track, if so state it?
First. It was discussed in the early part of the summer when Judge Melder was laying out the town of Clarks Fork by the prospectors and miners then there, pro and con as to the width of the
446 right of way, this was in the year 1889. And most of them decided or thought that it was 200 feet wide on each side of the bed of the track, many having been in the town of Trout Creek, Montana, when all the business and residences was forced to move back outside of the 200 foot limit. I will state further that in the

early winter of 1889 or the winter of 1890 that I wrote to the secretary of the interior asking in regard to the matter, he answered and said he had referred it to the commissioner of the general land office. The letter I received from him, Thos. Carter, the commissioner of the general land office, stated through the State of Idaho the Northern Pacific right of way was 200 feet on each side of the center of the track.

That letter was generally known to exist and I showed it to many people at Clarks Fork. Contestant now moves to strike out all that portion of the foregoing answer not responsive to the question and particularly that portion which refers to what had been done at Trout Creek, Montana.

Objection overruled. Exception taken.

Q. Have you ever examined this plat or map marked Contestant's Exhibit "D"?

A. Yes sir.

Q. State whether or not all of the land purported to be platted upon that map lies upon the forty in dispute?

A. It does not. As near as I can get at it about three fifths of the land platted off of the right of way is on the forty in dispute.

447 Q. Where do the other portion or two fifths lie?

Objected to as immaterial. Objection overruled.
Exception taken.

A. The other two fifths lies on the S. W. ¼ of the N. W. ¼ now claimed by the homestead of J. G. Nagel.

Q. What blocks as shown upon this plat are included within the Northern Pacific right of way?

A. All of block "A" as shown on this plat, the south ½ of block "B," the south ½ of block "C" and the south ½ of block "D."

Q. How many business houses were situated upon the forty in dispute other than those on the right of way on the 26 day of Feb., 1892.

A. There was not any.

Q. Other than the residence of M. P. Whitcomb and John E. White how many residences were upon the forty in dispute other than those upon the right of way on the 26 day of February, 1893.

A. Two.

Q. What were they?

A. Two frame houses, one occupied by William Huston at times, at other times by different ones who him or his agents gave permission to move in, in his absence, the other building was occupied by J. F. Vinton.

Q. How much of the time in 1892 and after the 26 of Feb., 1892, was the Vinton house vacant?

A. I do not think it was vacant at all, I think it was occupied by Vinton nearly all of 1892.

448 Q. How much of the time in 1893 was this Vinton house vacant?

A. It was vacant from the late spring or early summer of 1893

when Vinton moved out till the early summer of 1894, the time of the high water.

Q. How much of the time in 1892 was the Huston house vacant?

A. I do not think it was vacant much of the time, it might have been a day or two, vacant while changing occupants.

Q. How much of the time in 1893 was it vacant?

A. I will answer in the same way.

Q. Upon what subdivision of land is the lot upon which that Huston house is built?

A. A part of it is in the N. W. ¼ of the S. W. ¼, a part is in the S. W. ¼ of the N. W. ¼ of section 2, according to Contestant's Exhibit "D."

Q. How many business houses are there at present on this disputed forty other than those on the right of way, and by whom are they occupied or held, and when were they placed there?

A. There are three business houses, Joseph Butler's saloon, moved there off of the right of way the latter part of the summer of 1894, Whitcomb Bros. and Nagel general store establishment erected in the summer and early fall of 1895, a building moved back in the early fall of 1895 occupied by the post office and postmistress, Mrs. Thibadeau.

Q. State whether or not you have examined the plat or
449 map marked contestant's Exhibit "A" and introduced in evidence herein.

A. Yes sir.

Q. State whether or not blocks 11, 12, 13, 14, 15 and 16 or any part thereof is occupied by any one other than J. E. White and N. P. Whitcomb.

A. They are not.

Q. State whether or not the whole of Whitcomb's residence is upon any lot shown in said exhibit "A?"

A. It is not.

Q. State whether or not all of Whitcomb's residence lies upon the land in dispute.

A. It does not. There is a lean to or kitchen on the railroad section.

Q. How many acres of this disputed forty lies south of the railway right of way?

A. As near as I can estimate about one half.

Q. Other than the residence of White and Whitcomb how many families other than those who reside upon the right of way now reside upon the land in dispute?

A. There are six, taking a family as either a bachelor, old maid or a widow.

Q. When did White commence the erection of that house in which he lives?

A. In the spring of 1891.

Q. Which began the erection of his house first on that disputed forty, Whitcomb or White?

A. From my own knowledge I don't know.

450 Q. How much clearing has White upon this disputed forty?

A. I would estimate it between five and six acres.

Q. How much is in cultivation?

A. The same amount.

Q. What was the character of the land where this clearing was done before White settled upon it?

A. It was heavily covered with fallen and standing dead timber and now and then a scattering green timber.

Q. What was it worth per acre to clear it and put it in the state of cultivation that it is now in?

A. Seventy-five dollars an acre.

Q. State whether or not it was generally reputed in and about Clarks Fork from the spring of 1892 hitherto that White claimed this tract of land?

A. No sir, I had never heard it until after the survey.

Q. When was the public survey made there?

A. The line was run that decided what the town was on May 31, 1893.

Q. What effect has the usual rise of the Clarks Fork river upon the land in controversy?

A. It raises every spring and covers a part of this ground, backs up Mosquito creek and covers a part of it from an inch deep to six feet.

451 Q. At the time that the survey of which you speak was made how many business houses were there upon this forty other than those upon the right of way?

A. There was none.

Q. At that time how many residence houses other than those upon the right of way were there upon this forty in dispute?

A. Four, including the White and Whitcomb houses.

Cross-examination:

Q. When the width of the Northern Pacific right of way was first discussed at Clarks Fork in 1889 how many business houses were in existence and running on the forty in dispute?

A. One business and two tents on the right of way, John G. Nagel had a log house, a small general store and post office therein, Al Butler had a small tent about forty feet from the track used as a saloon, later on Geo. Robers put in a tent about forty feet from the track for a saloon.

Q. Did these business men when they started in the business at this point know that the right of way was more than a hundred feet on each side of the track?

A. I do not know sir.

Q. In what year did you receive the letter from commissioner Carter relative as to the date of this right of way?

A. I am not in a position to say as to the date it was late in 1889 or early in 1890.

452 Q. When you received this information from Commissioner Carter, how many business houses had been erected on this disputed forty?

A. Three on the right of way, Nagle, Butler Bros. and Roberts and Kelly.

Q. When you received this information from Commissioner Carter did you notify these business men or any of them that the right of way was 200 feet wide on each side of the track?

A. No sir I did not notify any of them, I showed it to any one who choosed to look at it, I couldn't mention the names of all who saw it.

Q. Had not the portion of this forty in dispute north of the railroad early in 1889 been by John G. Nagel surveyed, platted and laid off into blocks, lots and streets and alleys and the plat thereof published in the community and claimed as a townsite by Nagel?

Objected to as immaterial, irrelevant and not proper cross examination.

Objection overruled. Exception taken.

A. A part of it was and the remainder was a ranch.

Q. Did not Nagel's surveyed plat cover the business portion of the town site as it then existed and has continuously existed up to the present time?

Same objection. Same ruling. Same exception.

A. Yes sir, but it did not cover all the forty in dispute.

Q. Has John E. White at any time occupied any portion
453 of the disputed forty north of the railroad track off of the right of way.

Objected to as immaterial and irrelevant and for that reason possession or occupancy of any portion of a legal subdivision of forty acres is occupancy and possession of the whole thereof.

Objection sustained. Exception taken.

A. Not that I know of.

Q. Has John E. White at any time occupied or cultivated or enclosed blocks 11, 12, 13, 14, 15, 16 or either of them on contestant's exhibit "A".

Same Objection. Same ruling. Same exception.

A. Not that I know of.

Q. When you went to Clarks Fork in 1889 what was the condition of that part of this disputed forty lying north of the railroad?

A. Part of it was cleared and part of it was not probably four acres cleared outside of the right of way the cleared portion run along the right of way back of where Nagel's store was east towards Mosquito creek for thirty-five or forty rods, and then it ran north from there about 12 or 15 rods and came back in a westerly direction aside from that there was a little patch of ground partly on the right of way and partly off enclosed by cedar pickets where old man Gross raised a garden, a part of the clearing was where the business houses then stood and now stand and the rest of it was east of that.

Q. What was the condition of that part of the disputed
454 tract north of the railroad track in February, 1892?

A. There was no change of condition only the garden fence was torn down.

Q. Where did the business houses of Whitcomb Bros. & Nagel and Joseph Butler stand with reference to their present location on the disputed forty prior to their being placed at their present location.

A. Whitcomb Bros. and Nagle's building stood about 80 ft. south and 25 ft. west. The postoffice stood about 85 feet south and sixty to eighty feet east. The Butler building stood about 85 feet south.

Q. In what business was John F. Vinton engaged while living on the disputed forty off of the right of way?

A. General merchandise and postmaster; his place of business was on the disputed forty on the right of way, formerly John G. Nagel's house.

Q. What part and how much of this disputed forty is covered by the annual spring overflow of the river?

A. The east and southeast portion, about ten acres.

Q. How far from the business portion does this overflow land lie?

A. Close to 80 rods.

Now on this 29 day of February, 1896, both parties being present in person and with their respective counsel the following proceedings were had.

455 JOHN E. WHITE, the Contestee, being called and sworn on his own behalf testified as follows:

Q. State your name, age, residence and occupation.

A. John E. White, age forty-three years, residence Clarks Fork, Idaho. Occupation farmer and station agent.

Q. Are you the contestee in this case?

A. I am.

Q. Are you a citizen of the United States, if so are you a native or naturalized?

A. I am a native born citizen.

Q. Did you ever make any other homestead or any other entry for public lands in the United States?

A. I never did.

Q. Do you own any other land than the 160 entered by you homestead?

A. Not a foot.

Q. Have you a family and if so of what does that family consist?

A. I have a wife and five children.

Q. When did you commence the construction of your house upon this disputed forty?

A. My lumber was ordered I think in December, 1890, it was placed on the ground in March, 1891, and the house was erected from April 1, 1891, to about June, 1891, it was not finished until the 26 day of Feb., 1892, so that I could reside in it.

Q. When did you move into this house?

456 A. On the 26 day of Feb., 1892.

Q. Has your residence in that house been continuous since that time to the present?

A. Yes sir, except when driven out by high water in May and June, 1894.

Q. Where has your family resided since the 26 day of Feb., 1892.

A. Within the house I have just described.

Q. What time was the construction of Whitcomb's house upon that forty commenced with reference to the commencement of your house?

A. I do not remember the exact date but I know that it was afterwards.

Q. Describe your house.

A. It is a frame house, 20x30, it has seven doors, nine windows, 2 brick chimneys or flues, five rooms, matched flooring, papered and painted within; it is built about three feet off the ground, worth between five and six hundred dollars.

Q. State all the other improvements you have upon this disputed forty, giving the value thereof.

A. A combined store room and chicken house, a combined barn and pig house, a root cellar, a wood shed adjoining the house, worth in the aggregate about $250. I have a fence constructed of cedar pickets and galvanized wire around about ⅛ of an acre for a berry patch, this same fence forms my out side fence for a distance of about 400 yards.

Q. State how much land on your homestead claim you have under fence?

457 A. I believe about fifty *and* sixty acres.

Q. What was the character of the land when you settled there?

A. In the first place it was a very low piece of ground, it was heavily timbered with mostly dead standing timber and fallen timber, it took me about a week to find a place to locate my house.

Q. How much clearing have you all together?

Objected to as to any portion outside of the forty acres in contest and ask that witness be confined in his answer to the forty in dispute.

Objection overruled. Exception taken.

A. I think between 11 and 12 acres.

Q. How much was it worth per acre to clear it?

A. Well I think it is worth $100 an acre anyway.

Q. How much of this clearing is on the land in dispute?

A. About six acres.

Q. How much of this clearing on the disputed land has been cultivated and cropped by you?

A. All of it.

Q. Have you any fruit trees on the disputed forty and if so how many and what kind?

A. I have about 180 trees of various kinds of apples, apricots, peaches, pears, plums and cherries.

Q. How many head of live stock have you there?

Objected to as leading. Objection overruled.
Exception taken.

A. I have twenty-eight head, consisting of 3 milch cows, one heifer, twenty-five stock hogs.

458 Q. State what if any effect the annual spring rise of the Clarks Fork river and Mosquito creek has upon this disputed tract.

A. Well it makes the planting of any crop uncertain every year because it is liable to overflow.

Q. How much of this disputed tract overflows?

A. Nearly all of it.

Q. For what purpose did you settle upon that tract of land?

A. For the purpose of making a home.

Q. Has any one else any claim or interest in or to your homestead claim?

A. No sir, no one has.

Q. At the time you moved into your house did any one occupy or reside upon that portion of the disputed forty lying south of the railroad right of way?

A. No one resided upon it.

A. At the time that you moved into your house was there any business houses other than those upon the right of way located upon this disputed forty?

A. There was not.

Q. Aside from yours and Whitcomb's houses were there any dwelling houses on this disputed forty other than those on the right of way on the 26 day of February, 1892?

A. Yes sir, one, J. F. Vinton's.

Q. How much of the time from Feb. 26, 1892, to the spring of 1894 was Vinton's house occupied?

459 A. Well, as near as I can remember about one year of the time.

Q. Is all of Whitcomb's house upon the forty in dispute?

A. No sir, it is not.

Q. Where is the other portion of it that is not upon the disputed forty?

A. It is on the railroad section.

Q. How many business houses other than those on the right of way are there on this disputed forty and when were they placed at their present site?

A. There are three, Butler's saloon and hotel placed there in August, 1894, Whitcomb Bros., and Nagel store placed there in the summer of 1895, the postoffice belonging to Whitcomb Bros. & Nagel placed there in the fall of 1895.

Q. Other than your and Whitcomb's dwelling house how many dwelling houses not on the right of way are now upon this disputed forty?

A. Four. Hasselroth put there in the summer of 1895, the J. F. Vinton building put there in the spring of 1891, Pete Larson's put there this present year, Jasen Edward's put there in the fall of 1895.

SPOT ON

Q. Where are blocks A, B, C and D marked upon Contestant's exhibit "D" located?

A. On the right of way of the Northern Pacific railroad.

Q. Aside from those blocks is all the ground shown on said exhibit "D" upon the disputed forty?

A. It is not.

460 Q. What part is not shown as it is located?

A. I should say that there is about ¼ of it is not on the ground in dispute, it is on the forty north of the one in dispute, that is on the forties claimed by John G. Nagel as his homestead.

Q. State whether or not as early as 1890, Whitcomb Bros. and Nagel knew that the Northern Pacific right of way extended 200 feet on each side from the center of the railroad track?

Objected to as leading and suggesting an answer.

Objection overruled. Exception taken.

A. They knew it individually, yes sir.

Q. State whether or not in 1892 John G. Nagel and M. P. Whitcomb knew that you claimed the forty in dispute.

A. They did.

Q. State whether or not on or about the 29 day of April, 1895, at Clarks Fork, Idaho, M. P. Whitcomb made this statement to you in the presence of your son, Compton White, about this land here, if you are going to file on the whole 160, I will file on the 160 too and will give you a contest?

A. Yes sir.

Q. State whether or not on or about the 29 day of April, 1895, at Clarks Fork, Idaho, in the presence of your son, Compton, John G. Nagel asked you to permit M. P. Whitcomb to file a homestead for a portion of this disputed forty?

Objected to for the reason that it is incompetent and immaterial and for the further reason that if such proposition were made
461 no such filing of a homestead could be made under the homestead laws of the United States.

Objection overruled. Exception taken.

A. He did.

Q. State whether or not in 1891 Joe Butler, knew that you claimed the forty in dispute?

A. Yes sir.

Q. State whether or not in 1891 you had any conversation with Joe Butler with reference to your claim upon the forty in dispute?

A. Yes sir.

Q. State that conversation.

Objected to as immaterial, irrelevant and incompetent.

Objection overruled. Exception taken.

A. Joe Butler said to me when the survey comes you will get more of this land than you think you want to get some smart man with you who understands how to handle town lots I understand that business pretty well, you will get any way as Nagel has forfeited all the claim he ever had.

Cross-examination:

Q. At what date did you first settle at Clarks Fork?

A. On the 24 day of May, 1890.

Q. Upon what tract as per the survey of the townsite did you settle.

A. On the S. W. ¼ of section 2.

Q. Was it upon the land in dispute?

462 A. It was the Northern Pacific right of way passing through that land.

Q. When did your family come to Clarks Fork?

A. The last day of July, 1890.

Q. How long did you and your family reside at the depot?

A. From May 24, 1890, to Feb. 26, 1892, when I moved into my present home.

Q. Up to the time of commencing your house on the land in dispute what lands did you claim at Clarks Fork?

A. I claimed 160 acres that my house was to be built on subject to the government survey.

Q. In what manner did you claim or assert such claim to 160 acres of land?

Q. By conversation with a great many people there, and it was the town talk there that I was the next settler after Mr. Nagel and that he, Nagel, had forfeited his claim by selling town lots.

Q. Did you establish corners, blaze or mark out any lines or post any notices upon the 160 acres which you claimed and if so when?

A. I did not as my settlement and claims were known to all concerned.

Q. When did you first establish your claim to the 160 acres to which you had neither metes nor bounds marked?

A. On the 17 day of November, 1890.

Q. How did you on the 17 day of November, 1890, establish or seek to establish your claim?

463 A. By taking possession.

Q. Did you file any possessory right for the lands you claimed for record in the county recorder's office in which you described the land you claimed on November the 17, 1890?

A. Yes sir, but not fully, as I did not know what the survey would be.

Q. Have you that possessory right with you from which you can refresh your memory?

Objected to anything about possessory right as not being responsive to any matter brought out in the direct examination of the witness.

Objection sustained. Exception taken.

A. My memory does not need refreshing on that point.

Q. Then describe the tract of land which you claimed November the 17, 1890, by its boundaries?

Objected to for the reason that witness had already answered that

he claimed 160 acres, including the tract on which his house was situated to conform to the public survey.

Objection sustained.

A. It was not at that time bounded and I can't describe it.

Q. Did you not on the 17 day of November, 1890, claim the land embraced within the following description:

Commencing at a point on the south side of the N. P. railway track about two hundred yards east of the N. P. railway
464 depot at Clarks Fork, Kootenai County, Idaho, thence due south to the Clarks Fork river, thence east along the bank of the Clarks Fork 160 rods from said southwest corner, thence due north from said river to a point due east from the place of beginning, and thence due east from the place of beginning and thence west 160 rods to the place of beginning said tract of land being joined on the west by John McQuade's ranch, and was not the possessory claim so described by you sworn to, on November 17, 1890, before M. P. Stephens, Justice of the Peace, Clarks Fork Precinct, Kootenai county, Idaho.

Objected to for the following reasons: First. That said question is vague, uncertain and unintelligible in this, that it relates to some possessory filing or claim which has not been offered or introduced in evidence concerning which no evidence has been introduced, and for the further reason that the pretended description or boundary set forth in said question does not constitute any complete boundary of any tract of land and for the further reason that the date mentioned in said question is long prior to the commencement and construction of plaintiff's dwelling house upon the disputed forty and second, that said question is not responsive to any matter brought out in the direct examination of said witness and is therefore immaterial, irrelevant and incompetent.

Objection sustained. Exception taken.

A. Yes, I did, and whatever other land the government survey would give me.

465 Q. On the 17 of November, 1890, what act of settlements had you done or performed, and what improvements had you then made upon the land described in that possessory right?

Objected to for the reason that no possessory right has been introduced in evidence given concerning any possessory right otherwise immaterial, irrelevant and incompetent.

Objection sustained. Exception taken.

A. Well, I hadn't made any.

Q. Did you hold the land embraced within the boundaries of that possessory right up to the time that the field work of the government survey of the township was performed?

Same objection. Same ruling. Same exception.

A. Yes sir.

Q. Are all the improvements which you have described as yours within the boundaries described in that possessory right?

Objected to for the same reason that there is no evidence of any possessory right, the question is therefore immaterial, irrelevant and incompetent.

Objection sustained. Exception taken.

A. Yes, sir.

Q. When was that possessory right filed in the office of the county recorder of Kootenai county, Idaho?

Objected to for the following reasons: First. No possessory right has ever been introduced in evidence herein nor any com-
466 petent evidence given relative thereto and for the further reason that if there was any such possessory right the document itself is the best evidence of its contents and of the date upon which it is filed. Second. The question is not responsive to any matter brought out in the direct examination of this witness, and Third. It is otherwise immaterial, irrelevant and——

Objection sustained. Exception taken.

A. On the 17 day of November 1890.

Q. Was there any fence or land marks marking the line between the land you filed your possessory right and the ranch of John McQuade's which joins it on the west?

A. There was some rotten logs laid along the line.

Q. Who was residing on that McQuade ranch at the time of your filing?

Objection sustained. Exception taken.

A. I cannot remember at that exact date.

Q. From February 1891 up to the time that the survey lines were run by the government surveyor, who claimed and occupied the McQuade ranch?

Objected to as immaterial and irrelevant.

Objection sustained. Exception taken.

A. M. P. Whitcomb claimed it, and had John Rodes living in his house from about the middle of March 1891 until I think the last of October the same year. Instead of saying from the middle of March, say from about the middle of April.

467 Q. From what time up to about the middle of April was Rodes working there for Whitcomb?

A. I should say about the 10 day of March 1891.

Q. Did you ask Mr. Whitcomb in January 1891 to file a possessory right on the McQuade ranch?

Objected to for the following reasons. First it is immaterial, irrelevant and incompetent, and Second. If asked for the purposes of impeachment or contradiction the foundation is not properly laid. Third it is vague, uncertain, indefinite.

Objection sustained. Exception taken.

A. I did not.

Q. Has any portion of the land embraced in your possessory right

and on the forty now in dispute been cleared or otherwise improved before you moved there?

Objected to as immaterial, irrelevant and incompetent, and for the further reason that no possessory right has been introduced in evidence nor any evidence that any lands whatever are described or set forth in any possessory right claimed by witness and for the further reason that it is not proper cross-examination.

Objection sustained. Exception taken.

A. Yes sir but not before I began to build my house.

Q. About how much was cleared and had it been cultivated?

Same objection. Same ruling. Same exception.

A. About an acre and a half when I moved there. It had
468 been cultivated but it had not been cultivated when I commenced to build my house.

Q. What part of the forty in dispute overflows annually in the spring?

A. Nearly all of it that is all but about six or eight acres of this forty.

Q. How much of the disputed forty is annually overflown in the spring by the rise of Clarks Fork river and what part of it?

A. Well I am unable to say, I never observed close to say it will require measurement and then the overflow is so irregular that even if I had the measurements it would be hard to make an estimate.

Q. What portion of the land in dispute lying north of the railroad track has each spring since 1891 been subject to overflow from the rise of the Clarks Fork river, in your answer give the date and extent of overflow each spring?

A. None of it from the river except the spring of 1894 when it was nearly all overflowed.

Q. What portion of the land in dispute lying south of the railroad track has each spring since 1891 been subject to overflow from the rise of Clarks Fork river, in your answer state the area each year and the part of the land so overflown?

A. It would be impossible to answer that question because I will state as I stated before that the land undulates and cut up in the spring by water that overflows from the Clarks Fork river and to state each year would re*q*ure a memorandum made each year
469 since I have been on the land but I will say in the aggregate about 1/3 of it every year.

Q. Where does that third of the portion south of the track which thus overflows lie?

A. Immediately south and east of my house.

Q. How far from the business portion of the town?

A. About 350 yards.

Q. Aside from your house, Whitcomb's and Vintons were there on the 26 day of February, a dwelling house or houses on the disputed forty?

A. None other.

Q. Where was the Huston house?

A. I cannot say whether the Huston house was on the disputed forty or not. I believe it was.

Q. Was not Nagel in 1890 claiming that portion of the forty north of the railroad track as a townsite?

A. He was claiming it as a ranch as a homestead but he had surveyed a townsite on that homestead.

Q. Was he not leasing lots on that portion when you went there?

Objected to as immaterial and irrelevant and not proper cross examination.

Objection overruled. Exception taken.

A. Yes sir.

Q. Examine Contestants Exhibit "D" and say whether or not that plat is substantially as his lots and blocks were laid out at that time?

A. I do not know whether it is or not.

Q. According to that exhibit are not parts of the lots in
470 block "A" and the lots in blocks "D" and "C" in the south half thereof more than 200 feet north from the center of the Northern Pacific railroad track?

A. I do not think they are.

Q. Do they not extend more than two hundred feet from the center of said track?

A. To the best of my information they do not.

Q. Can you state that the business houses of Whitcomb Bros. and Nagel, the postoffice and the business buildings of the Butlers do not now stand 17 feet toward the railroad track from the alley running through blocks "B" and "C" as per contestants exhibit "D"?

A. I do not believe they do, my impression is they are entirely north of the alley as shown by contestants exhibit "D."

Q. Do you state as a fact that no portion of said buildings are upon the rear of the lots in the south ½ of these two blocks?

A. Not having measured the distance I cannot swear to it, but, from my knowledge I do not believe it.

Q. Is the space in front of said lots representing the right of way more or less than the depth of the lots?

Objected to for the reason that the plat is in evidence and should speak for itself.

Objection sustained. Exception taken.

471 A. The distance is just the same according to this map.

Q. How far from the center of the track are the buildings of Nagel and Butler's business house at present situated?

A. I can't say upon my oath how far, I know they are required to be a full 200 feet from the center of the track.

——— ———

Subscribed and sworn to before me this 29 day of February, 1896.

——— ——— *Register.*

Now at this time contestee announces that he closes his case.

Now at this time the contestant recalls JOHN G. NAGEL in rebuttal:

Q. How far from the center of the Northern Pacific track are southern termini of the lots as laid down on contestants exhibit "

A. About 115 feet.
Q. Has the distance been measured?
A. Yes sir.
Q. How deep are those lots?
A. 110 feet running north.
Q. How far then is the Northern termini of those lots from the ter of the Northern Pacific railroad track?

A. 225 feet.

Q. On what lots did your old buildings stand on exhibit "D."

A. On lot 7 in block "B."
Q. On what lots on exhibit "D" do your business buildings now nd?
A. On lot 9 in block "B" a portion of it on lot 8 in block "B."
Q. Did you from 1884 to 1895 occupy in connection with your iness use all of lot No. 7 in block "B" in contestant's exhibit "D."

bjected to: First. Leading. Second. It is not rebuttal, and con-stee at this time objects to any new matter or any other evi-ce that is not strictly in rebuttal, and states to the register and iver has announced that it closed its case. Contestee has dis-sed the greater part of his witnesses who have returned to their ne and cannot be procured to rebut any new matter that may be oduced by contestant.

To which objection Contestant replies that the defense in this con- relies largely upon the alleged fact that all of those business dings were situated upon the Northern Pacific right of way and evidence tends to directly disprove this fact by showing that the upon which those business buildings were situated when first t cover a portion of the forty acres in dispute and that these re lots were used in connection with these business buildings for purpose of trade and business prior to the year 1890.

bjection overruled. Exception taken.

A. Yes sir.

——— ———.

ubscribed and sworn to before me this 26 day of February, 1896.

——— ———, *Register*.

OSEPH BUTLER being recalled by the Contestant in rebuttal testi-as follows:

Q. How far from the center of the Northern Pacific railroad track the southern termini of the lots down on contestant's exhibit "

A. I measured it with a tape line 115 feet.
Q. How deep are those lots?
A. 110 feet.

Q. How far then is the northern termini of those lots from the center of the Northern Pacific railroad track?

A. 235 feet.

Q. On what lots did your business building stand when first built on exhibit "D?"

Objected to as not proper rebuttal.

Objection sustained. Exception taken.

A. Lots 1 and 2 in block "C".

Q. On what lots on exhibit "D" do your business buildings now stand?

Same objection. Same ruling. Same exception.

A. On the north portion of lot 1 in block "C" on or about 15 feet of it.

Q. Did you in 1889 when you first built your business buildings thereon continuously up to 1894 occupy and use in connec-
474 tion with your business buildings all of lots one and two in block "C" in contestant's exhibit "D."

Objected to First. As not being strictly rebuttal and as being a part of contestant's original case and Second as being leading. To which objection contestant replies that the defense in this contest relies largely upon the alleged fact that all of those business buildings situated upon the Northern Pacific right of way and this evidence tends to directly disapprove this fact by showing that the lots of land upon which these business buildings were situated when first built cover a portion of the forty acres in dispute off of said right of way and that those entire lots were used in connection with these business buildings continuously for the purposes of trade and business prior to the year 1890 and subsequently up to the time that these business were moved to their present site.

Objection overruled. Exception taken.

A. Yes sir.

——— ———.

Subscribed and sworn to before me this 29 day of February, 1896.

——— ———, *Register.*

Contestant now offers in evidence a certified copy of the possessory right of the Contestee John E. White recorded in the office of the recorder for Kootenai County, Idaho, on the 18 day of November 1890, and recorded in book "A" of possessory claims on page
475 139, marked contestant's exhibit "F". To the introduction of said document contestee objects for the following reasons: First that it is immaterial, irrelevant and incompetent. Second that it is inadmissable for the reason that it is hearsay evidence, the same appearing to be not a copy of the original possessory right, but a copy of a record of Kootenai County, Idaho, as is shown by the certificate thereto attached. Third, that the original possessory right is the best evidence of its contents and no secondary evidence of its contents nor a copy of it is admissable in evidence in any case until it has been

shown that the original is lost or in the possession of the adverse party in which latter case no copy is admissable until it has been shown that the adverse party has been notified to produce the same. Fourth. The document offered in evidence does not purport to be nor is it certified to be a copy of any document executed or signed by contestee or by his authority but purports to be and is certified to be a copy of a record found on book "A" on page 132 of possessory claims of the records of the Kootenai County, Idaho.

Objection sustained. Exception taken.

Contestant now calls the attention of the register and receiver to the township plat of the government survey covering the land in dispute which shows upon its face that Clarks Fork station together with a settlement of buildings is situated thereon.

Now at this time both parties by their counsel announce that they close their case.

476 DEFENDANTS' EXHIBIT No. 2.

In the United States District Land Office, at Cœur d'Alene City, Idaho.

HENRY MELDER, as Probate Judge of Kootenai County, Idaho, Contestant,

vs.

JOHN E. WHITE, Defendant.

Involving Northwest ¼ of Southwest ¼ of Section 2, Township 55, N, R. 3 E.

It is hereby stipulated that the hearing and trial in above mentioned matter and case and contest be, and the same is hereby, set for trial for ten o'clock a. m., on Wednesday, March 26th, 1902, and each party waives notice of such hearing and trial as required by the rules and practice of the Land Department, and each party hereby agrees to be present with their respective witnesses and to proceed with the hearing and trial at said time, unless prevented by sickness or matters over which the respective parties have no control.

Dated this 10th day of March, 1902.

CHAS. L. HEITMAN,
Attorney for Henry Melder, Contestant.
H. M. STEPHENS,
STEPHENS & BUNN,
Attorneys for John E. White, Defendant.

In the United States Land Office at Cœur d'Alene, Idaho.

477 HENRY MEDLER, Trustee for Clarks Fork Townsite,
vs.
JOHN E. WHITE.

Contest H. E. No. 958 and F. C. 417.

Further hearing in this case ordered by G. L. O. letter "G" of January 14th, 1902, enclosing copy of Departmental decision of December 20, 1901.

The subject matter of this inquiry according to the terms of said Departmental letter are as follows:

First. What portion of the land in controversy was included within the claimed townsite settlement at the time of the allowance of White's entry? (Nov. 27, 1895.)

Second. What was the character of the occupancy and improvements of the townsite claimant at the time of the allowance of White's entry?

Third. What portion of the land in controversy was included in the claimed townsite settlement at the time of the submission of final proof upon White's entry? (Nov. 29, 1897.)

Fourth. What was the character of the occupancy and improvements of the townsite claimants at the time of the submission of final proof upon White's entry? (Nov. 29, 1897.)

Fifth. Did White, by acts or declarations between the allowance of his entry and the submission of final proof thereon, and if so to what extent, enco-rage or induce the townsite claimants to
478 occupy or improve lands within the claimed townsite settlement, and to what extent if any, did he acquire in such occupancy or improvements, between the times named?

Sixth. Did White between the dates named, enter into any contract in writing with one Roberts, or any other person, whereby White agreed, upon obtaining title under his entry, to dispose of any of the lands in controversy for townsite purposes, or whereby White induced Roberts or any other person, to refrain from participation in the assertion of the claim of the townsite people?

Seventh. What was the number of inhabitants and the value of improvements in the claimed townsite settlement at the time of the allowance of White's entry at the time of his submission of final proof thereon respectively?

The parties are especially cautioned that none but competent evidence relevant to the matter under consideration will be accepted.

The burden of proof will be upon the townsite claimants and the rule respecting the apportionment and payment of costs which would be applicable of this were an original contest will be applicable to this hearing.

The particular ground occupied by the claimed townsite settlers at the time of the allowance of White's entry and at the time of the submission of the final proof thereon, respectively, should be so de-

scribed and its description so tied to establish government
479 corners or monuments and the acreage thereof so computed, that the department could if that seemed to be just in the premises, segregate the same from White's entry.

On January 20, 1902, the parties in interest were served each with a copy of all the matters included in this controversy as above set forth. Concluding with a notice to the parties the register had that day informed the Honorable Commissioner that he was disqualified to sit in this case having been an attorney in the case at the original hearing asking that a special agent be detailed to sit in his place.

And that this notice was issued and sent out to inform the parties fully that they may make ample preparation for the hearing when ordered.

On February 19, 1902, Louis L. Sharp, Special Agent, was designated by the Department to sit in this case in place of the disqualified register.

On March 10, 1902, Charles L. Heitman, Esq., attorney for Henry Melder, Contestant, and H. M. Stephens, Esq., of the firm of Stephens & Bunn, attorneys for John E. White, defendant, entered into a stipulation in writing that the hearing and trial in the above mentioned matter and case was set for 10 o'clock a. m., March 26, 1902, and each party waived notice of such hearing and notice as required by the rules of practice.

Now on this 26th day of March, 1902, this case comes regularly on for hearing and the contestant being represented by
480 Charles L. Heitman, Esq., and the Contestee, John E. White being present in person also represented by George H. Lamar; James Graham, Esq., H. M. Stephens, Esq., and Special Agent Louis L. Sharp, also being present to act in place of Register in this hearing, and Edwin McBee, Esq., producing his authority to appear on behalf of Henry Melder, as probate judge of Kootenai County at the present time, when the following proceedings were had:

Comes now counsel for the Contestee, John E. White, the final entryman and objects to the appearance or substitution of the probate judge, Edwin McBee, first on the ground that the proceedings in this cause are not such as to entitle the protestants to any standing under the townsite laws of the U. S. and counsel renews the objection to the original proceedings made by counsel for entrymen at a prior hear:

Second. Because by the decision of the honorable, secretary of the interior of May 22, 1899, (28 L. D. page 412) it has been found in a final decision of the land department that the alleged townsite occupancy, as it existed on Feb. 26, 1892, when the residence of said entryman was established, was not in contemplation of the townsite laws on any part of the N. W. ¼ of S. W. ¼ of sec. 2; but, on the contrary, was wholly on the railroad's right of way, the title to which had heretofore passed from the government of the U. S. to the N. P. Ry. Co.; and that the question of prior occupancy having
481 been disposed of the townsite claimants *such* have no standing under the laws of the U. S.

Third. Because the application of protestants on which this supplemental hearing has been ordered was made subsequent to the time at which Judge Melder had ceased to be Probate Judge and was not made in the name or with the authority of the then existing probate judge of said county.

Fourth. Because the Hon. Sec. of the Interior recognizes in said order of hearing under date of Dec. 20, 1901, that the application for the hearing is made in behalf of protestants and not as a contestant in person of the Trustee for a townsite.

Objection overruled and exception taken.

JOHN G. NAGEL being produced and sworn on behalf of contestants testifies as follows:

Q. State your name, residence and occupation.

A. John G. Nagel, age 41 years, residence Clarks Fork, Idaho, farmer and mill man.

It is urged on behalf of final entryman, both as a matter of fact and law that the rights of the final entryman to the whole of said legal subdivision have long since become invested and cannot now be divested, wherefore, general objection is hereby made to the introduction of any and all testimony whatever, especially in so far as the same may relate to a period subsequent to the time when the rights of said entryman became invested. And in so far as the same may be based upon any alleged statement or contract of
482 said entryman not in writing or conformable to the statutes of fraud with respect to real property located in the state of Idaho.

Objection is overruled and exception taken.

Q. Are you acquainted with the land in controversy, to-wit, the N. W. ¼ of S. W. ¼, Sec. 2, Twp. 55, N. R. 2, E. B. M. in Kootenai county, State of Idaho?

A. I am.

MR. LAMAR: I protest against so much of the question as relates to any portion of and south of the R. R. right of way, as being incompetent. Because it is a repetition of the question asked at the former hearing.

Objection overruled and exception taken.

Q. How long have you known this land?

A. Since 1884.

Q. State whether or not you have known every portion of this land since 1884.

A. I have.

Q. State the means and sources of your knowledge.

MR. LAMAR: I object to the question in as far as it may call for the testimony outside of the scope of the supplemental hearing and this objection asked to be made a general one.

Objection sustained and exception taken.

Entryman admits that the witness has resided in the vicinity since 1884 and in the vicinity of the land in controversy.

Q. What opportunity have you had for becoming acquainted with the land in controversy?

483 A. A portion of the disputed land was included in my Possessory Claim and I have lived on it a number of years.

Q. What portion of the land in controversy was included within the claim townsite settlement at the time of the allowance of John E. White Hd. Entry on Nov. 27, 1895, if you know?

Witness being handed contestant's Exhibit "A" of the former trial being a plat of the townsite of Clarks Fork as surveyed, filed and dedicated by Henry Melder as trustee of the inhabitants of the town of Clarks Fork, which said map was filed in the U. S. land office at Cœur d'Alene, Idaho, with the original affidavit of contest and is so endorsed.

A. Whitcomb Bros. and Nagel's store on lot 1, block 10, north of the R. R. right of way, two story building, value about $2,000. Frame building, lower story being used for a store building and the upper story for a hall. It was built in the summer 1895. It was occupied as a store building as soon as completed and has been used as such ever since. The business conducted there was general merchandise business. The building on lot 10 and block 9 is occupied as a saloon and hotel. The building was a two story frame, lower floor being used for hotel purposes and upper floor for sleeping rooms. Value about $1000. It was so occupied on Nov. 27, 1895, and continuously up to Nov. 29, 1897. On Nov. 29, 1897, the value of this building was between $1500 and $2000.

484 The cause of that increase in value was that another building was added thereto on the adjoining lot in spring of 1897. And the building being generally overhauled and improved. In block 9, lot- 1 and 2, a one story frame building used for a dwelling by Jason Edwards and his family. One story frame, value about $200. It was used as a dwelling in Nov. 1895 and has been so used ever since. In Nov., 1897, its value was about the same, except what outbuildings had been erected in the meantime, to the value of about $100. These outbuildings were erected between the periods of November, 1895, and November, 1897, in block 9, lot 8, a one story building, value about $150. It was owned by Butler Bros. It had been used partly as a laundry and partly as a residence. In Nov. 27, 1895, it was used as a residence. It was removed in the summer of 1897, torn down. On lot 9, block 9, one story frame building, used as a dwelling, value about $200, by the family of Joseph Butler. Between Nov., 1895, Nov., 1897, it was used for the same purpose, then it was removed to either lot 10 or 11, block 5, in the spring or summer of 1897 by Tom March and Reub Johnson. It was occupied from the spring of 1897 to Nov. 27, 1897, by Tom March and Reub Johnson. Value in Nov. 29, 1897, about $300.00. A building being located partly on lot 10, block 9, partly in the street dividing blocks 9 and 5 owned by Whitcomb Bros. and Nagel, value about $200.00. Used for a dwelling in 1895 continuously ever since. Value in Nov. 1897, $300.00. A building located

485 in the street dividing block- 9 and 5 belonging to Whitcomb Bros. and Nagel, value about $100.00, used as a barn in Nov.,

1895 and continuously since, valued in Nov., 1897, $100.00. One story frame building located in the street dividing block 10 and 6, owned by Mrs. Lloyd, value about $300.00 used as dwelling in Nov., 1897 and continuously ever since, value in Nov., 1897, $300. One story frame building located in the street dividing block- 10 and 6, value about $200, used as a dwelling in 1895, and continuously ever since, a portion of it in 1895 was owned by M. P. Whitcomb. In Nov., 1897, the same portion was owned by Whitcomb. The other portion was owned by Hutton but was not built until 1897. Value on Nov., 1897, original building $200, addition about $75. A fraction and insignificant fraction extends over on quarter section north belonging to me, erected prior to the survey. On lot 2, block 10, a one story frame building, used as a postoffice and dwelling by Mrs. Thibadeau and family, property of J. G. Nagel, value $150, value the same in Nov., 1897.

Q. State whether or not there were any other saloons or hotel buildings within the townsite settlement on Nov., 1895.

Counsel for the entryman objects to the introduction of any testimony relating to improvements which may have been on the R. R. right of way and requests that the witness be cautioned not to give any testimony relating to improvements on the right of way.

Registrar and receiver rules that witness confines his testi-
486 mony to improvements not on the right of way, in referring to the land in controversy.

Contestant excepts.

Q. State whether or not on Nov. 27, 1895, one George Roberts owned, occupied and used a saloon building or hotel or both on the land in controversy?

A. He did. Also a store building and warehouse. The buildings were located fronting lots 4, 5 and 6, block 10, I mean in front of said lots.

At this stage of the proceedings it is hereby stipulated by and between the parties hereto that Messrs. Lake and Sholes, stenographers, shall make stenographic notes of the balance of the testimony herein the same to be written out and written testimony thus taken and written shall be considered as a true and correct statement of the testimony actually given by the witnesses after being duly sworn at the hearing without the same having been subscribed by the several witnesses testifying in the case. And otherwise complying with the terms of rule 42 of practice. The signing of the aforesaid stipulation is hereby waived by the parties hereto, the same having been read in their hearing.

Trial resumed at 9:30 o'clock a. m., March 27, 1902. Present, the special agent acting as the register, and the receiver and Messrs. Lamar, Graham and Heitman.

JOHN G. NAGEL.

Direct examination resumed by Mr. HEITMAN:

Q. You may go on, Mr. Nagel, and describe more definitely
487 the situation of the Roberts store building, warehouse, etc?
A. I have described the location of the same a- near as I can.
Q. How near to said lots were those Roberts buildings?
A. The buildings were enclosed by a fence on the sides, and extended back onto the lots.

Mr. LAMAR: We except to the answer as not responsive to the question.
Mr. HEITMAN: He says they extended back on the lots.
Objection overruled. Contestee excepts.

Q. How far back on these lots did the Roberts building extend?
A. The buildings mentioned.
Q. Yes.
A. They did not extend onto the lots.
Q. What other buildings, if any, did George Roberts have on these lots above mentioned, in November, 1895?
A. A one story frame building.
Q. For what purpose used?
—. ——.
Q. By whom? Describe the same, Mr. Nagel, just take up the building and describe it; state for what it was used and by whom occupied, value, etc.
A. The building was occupied, I think, by various families connected with the hotel business.
Q. Whose hotel business?
A. Of the said Roberts.
488 Q. What other improvements, if any, did George Roberts have on those lots in November, 1895?
A. A barn, a chicken house, a pig pen and closet.
Q. Any other improvements on these lots?
A. And an orchard.
Q. How large an orchard? How many trees; about how many acres did it cover?
A. Covered probably an eighth of an acre; about fifty trees and some shrubbery.
Q. Strawberries or shrubbery.
A. Shrubbery.
Q. What was the character and value of Robert's warehouse and saloon and hotel buildings in November, 1895?

Mr. LAMAR: We have no objection to his giving full information about this Roberts house. We do not think you have alleged any value.

Q. I understood you the dwelling house was on these lots. is that?

REGISTER and RECEIVER: Any ruling I have made in rega the right of way will be withdrawn and accept evidence regar these buildings, no matter where located. In cross examination can bring out whether or not it is on or off the right of way; b this time he shall be allowed to testify to any thing regarding buildings, no matter where they are located.

Mr. LAMAR: We except to the ruling.

The REGISTER and RECEIVER: Gentlemen, you are not goi waive cross examination:

489 Mr. LAMAR: No sir.

Q. Now, go on and describe the store building and saloon. them up in detail like you did yesterday, what it was worth in vember, 1895, and what it was used for.

A. The hotel and saloon building. They are two story fr buildings under separate roofs but joined together. The store b ing was a one story frame building attached to the hotel build The warehouse was a separate building situated a short dist from the rest of the buildings described.

Q. Now, what was the value? Go on and state their value vember 27, 1895.

A. The value was about $3000.

Q. State for what purpose they were used at that time.

A. They were used at that time for a hotel, saloon, store and warehouse purposes.

Q. Well, for what purpose were they used between November 1895, and November 27, 1897?

A. For the same purposes.

Q. What was the value of this saloon, store and hotel build November 27, 1897?

A. The value was the same as the year before.

Q. State it?

A. About $3000.

Q. What was the value on November 25, 1895, of Roberts' dence building?

A. About $150.

Q. What was its value November 29, 1897?

490 A. $150 about.

Q. For what purpose was it being used in Novem 1895?

A. As a dwelling.

Q. What was it used for in November, 1897?

A. As a dwelling.

Q. What was the value of the Roberts orchard on these lots vember 27, 1895?

A. About $300.

Q. What was the value of this orchard in November, 1897?

A. About $300.

Q. State whether or not Roberts had any other improvements this ground.

A. There was a wood shed, a frame woodshed built in 1896.
Q. Was it there in November, 1897?
A. It was.
Q. Was there a pump well? Where was the woodshed and the pump located?

Mr. LAMAR: He never said anything about a pump.
Mr. HEITMAN: I asked him, and he said yes.
Mr. LAMAR: We except as being leading.

Q. State the value of the woodshed in November 1895, and again in 1897.
Mr. GRAHAM: He said it was not built until 1898.
The WITNESS: The value was about $100.
Q. The value of the woodshed in November, 1897, then?
491 A. The value was about $100.
Q. Where was it in reference to these lots?
A. I think it was partly located on the lots and partly on the right of way.
Q. Were there any other improvements on these lots or connected with any of Roberts' buildings in November, 1895?
A. There was a force pump in the rear of the buildings described. I am not positive whether it was located on there or on the right of way.
Q. What was the value in November, 1895?
A. About $25.
Q. What was the value in November, 1879?
A. About $25.
Q. State whether or not there were any other buildings within this claimed townsite settlement on November 27, 1895. Pick out the first one you come to.

Mr. LAMAR: We renew generally the objection and ask that it be made generally to improvements on the right of way.
Objection overruled. Contestee excepts.

Q. Go on and pick out any buildings there, Mr. Nagel, whether it is on the right of way or not.
A. On the south side of the railroad track——

Mr. LAMAR: Mr. Register and Receiver, would it be proper that you should instruct the witness to specify what improvements are on the right of way and what off, as we go along?
492 The REGISTER and RECEIVER: I think it would be perfectly proper.
Mr. HEITMAN: Yes, I have no objection to it.
The REGISTER and RECEIVER: Specify in describing a building whether it is on or off the right of way.

A. In block 11, lot 10 and the fractional lots adjoining the same, a one story frame building, used as a dwelling by Mr. M. P. Whitcomb and family.
Q. And what other improvements were on that lot?
A. A frame barn, chicken house, woodshed, and other outbuildings, small outbuildings.

Q. For what purpose were those buildings used in November, 1895?

A. Used for dwelling purposes, building purposes.

Q. By whom?

A. By M. P. Whitcomb and family.

Q. For what purpose were they used between November, 1895 and November, 1897?

A. For dwelling purposes.

Q. What was the value of those buildings and other improvements in November, 1895?

A. The value of the dwelling about $400, and the out buildings about $200.

Q. What was the value of those buildings in November, 1897?

A. The value of the dwelling about $400 and the outside buildings $200.

Q. State whether or not there were any other improvements on these lots in November, 1895?

493 A. An orchard consisting of about one acre, containing about one hundred fruit trees and a considerable amount of shrubbery, the remainder of the ground being occupied for garden purposes. The place was enclosed with a substantial fence.

Q. What was the value of those fruit trees in November, 1895?

A. About $300.

Q. What was the value in November, 1897?

A. About $400.

Q. What was the value of the fence enclosing these lots in November, 1895?

A. About $50.

Q. What was the value of the fence in 1867?

A. About $50.

Q. Select any other building, if you can, on the land in controversy, that was there in November, 1895.

A. A one story frame building used as a residence by John E. White and family, value about $400

Q. For what purpose was it used in November, 1897?

A. It was used for dwelling purposes by John E. White and family.

Q. What other improvements did Mr. White have on this land?

A. A barn, a woodshed, a pig pen, a chicken house and other small out buildings.

494 Q. What was the value of this barn and other outbuildings in November, 1895?

A. About $150.

Q. What was their value in November, 1897?

A. About the same, about $150.

Q. State whether or not there were any other buildings or improvements on this land in controversy in November, 1895.

A. All those that are located there in 18-5, I think I have enumerated.

Q. Now go on and state what buildings, if any, were erected on the land in controversy between November, 1895 and November, 1897, and which were on the land in November, 1897.

A. A frame building used as a cellar.
Q. A cellar; whose was it and where?
A. By Whitcomb Bros. Nagel; was erected on fractional lot in block 5.
Mr. LAMAR: Give the number of the lot.
A. It must be 7.

(Direct resumed:)

Q. Just enumerate, describe the cellar, how large was it and what was it used for and what was its value?
A. It was used for storing vegetables. Its value was about $100 in 1897.
Q. State what was the other improvements or buildings on this land in controversy.
A. A one story frame building, located on fractional lots 4 and 5 in block 5.
Q. By whom?
495 A. One by Mr. Shindler, value about $200, occupied as a dwelling by the said Shindler.
Q. Anything previous to November, 1895?
A. It was previous to November.
Q. Give the date when these other buildings were put there about the date.
Mr. LAMAR: Go back to that root cellar.
A. In October, as near as I can remember, the root cellar.
Q. Whose root cellar?
A. Whitcomb Brothers & Nagel's.
Q. Identify it as Whitcomb Bros. & Nagel's cellar. Go on about Mr. Shindler's house and improvements; locate them and describe their character and value when built, and for what used?
A. The Shindler dwelling was placed on the lots described in October as near as I can remember, 1897.
Q. State what they were used for and their value.
A. Value $200; occupied as a dwelling by the said Charles Shindler.
Q. State whether or not Mr. Shindler had any other improvements on these lots besides the dwelling?
A. He fenced the lots, enclosed the lots with a fence.
Q. When?
A. I am not positive whether he completed the fence prior to November, 1897, but he had the posts set, at least, as near as I can remember.
496 Q. What was the character and value of that fence?
A. About 25 dollars.
Q. Describe the buildings or improvements on this land in controversy in November, 1897.
A. On lots 10 and 11, a one story frame building occupied by Walter Fleming and family as a dwelling; value about $200.
Q. Erected when?
A. In October, 1897, or previous thereto.

Q. Any other improvements on those lots by Mr. Fleming at that time?

A. The lots described were enclosed in a substantial board fence.

Q. Value?

A. Value about $25.

Q. Give other improvements or buildings, if any, on the land in controversy, November, 1895.

A. A one story frame building, situated on lot 4 as near as I can remember, in block 5, occupied as a dwelling by Peter Larson, erected in 1896, value about $150, enclosed by a substantial board fence. The lot value about $15.

Q. Who owns that building now?

A. It is owned by Whitcomb Brothers at the present time.

Q. Who owned it in November, 1897?

A. I am not positive whether it was owned then by the said Peter Larson or by Whitcomb Brothers.

Q. Go ahead, if there were any other buildings or improve-
497 ments on this land in November, 1897.

A. Lots 14 and 16 in block 5, enclosed with a substantial board fence by Tom McWilliams in the spring of 1896.

Q. Were they there in November, 1897?

A. They were.

Q. Go ahead and state the value and for what the lots were used, if for anything?

A. The lots were used for raising vegetables immediately after they were fenced, and continuously ever since. The value of the fence is about $30.

Q. State whether or not there were any other buildings or improvements on the land in controversy in November, 1897.

A. There were a number, probably from twelve to twenty other lots fenced.

Q. Describe them.

A. I am not positive whether I can locate them correctly on the map.

Q. Give them as near as you can, so they are on that land.

A. They are located in blocks 2, 4, 5, 8 and 9.

Q. What was their value?

A. The lots were fenced by various different persons and were used in most cases as gardens after being fenced.

Q. State whether or not Carpenter Wilson——

Mr. LAMAR: We object to your asking leading questions.

Mr. HEITMAN: I was going to ask him whether or not
498 Carpenter Wilson made any improvements on this land in controversy prior to November 27, 1897. I think he has overlooked one man.

Objection overruled. Contestee excepts.

A. Mr. Wilson fenced two lots in the spring of 1897.

Q. Can you locate these lots?

A. They are in block 2, if I am not mistaken, and after being cleared platted it and planted it in potatoes, after being fenced.

Q. What was the value of his improvements on these lots in November, 18-7?

A. About $100.

Q. State whether or not in November, 1897, there were any other buildings or improvements on the land in controversy.

A. I think I have enumerated all of the buildings that I can think of.

Q. State if you know what the population of the land in controversy was on the 27th day of November, 1895.

A. From fifty to sixty.

Q. How many of those inhabitants were living on the railroad right of way November, 1895?

A. The number I have stated is a conservative estimate of those that were living on the townsite at the time.

Q. Off the right of way?

A. It may include that.

Q. How many of this number of inhabitants on November, 1895, were living off the right of way. You know how many were on the right of way.

A. The number I have stated were those living off the right of way.

Mr. GRAHAM: Go on and state how many were living on the right of way, if anybody.

A. How many were living on the right of way?

By Mr. HEITMAN (resuming):

Q. Yes.

A. About ten or twelve.

Q. What was the number of inhabitants on this land in controversy November 27th, 1897?

A. About seventy-five.

Q. How many of this number were living on the railroad right of way at this time, if any?

A. About ten or twelve.

Q. State whether or not you know of your own knowledge that John E. White, subsequent to November, 1895, sold or offered to sell, any blocks or lots in this land in controversy.

Mr. LAMAR: We object to the question; first on the ground that it is not limited to the scope of the hearing, namely, between 1895 and 1897; second, that it embraced a period after the time at which his rights become vested, and third, because the proper foundation has not been laid, and the question calls for a conclusion instead of the facts on which a conclusion is based; and fourth, because the written instrument is best and only evidence which could be submitted by which to show a sale under the Statute of Frauds, as it relates to the State of Idaho and the land in controversy.

Mr. HEITMAN: The contestant desires to show by this line of questions that, subsequent to November, 1895, John E. White offered to sell lots——

Mr. LAMAR: I except to their being on record here, the counsel's statement of what he desires to go into this record and what cannot be gotten in. Under the rules of evidence in regard to this case, he must lay his foundation of record as to what he desires to prove, and insinuate that into the record which cannot be obtained by testimony itself under the rules of evidence. I object to counsel making a statement in this record which cannot be proven by testimony, and I submit the only question he can ask on this subject is that in regard to the identification of some instrument in writing as a basis for this testimony.

Objection to Mr. Heitman making his statement was overruled. Exception taken.

Mr. HEITMAN, continuing, —offering to sell lots to the witness, John G. Nagel for business purposes, thus tending to corroborate the contention upon which this contestee was originally initiated, to wit, upon the ground that the said John E. White had not filed his homestead entry upon the land in controversy in good faith, but for the purpose of speculation; that this evidence could not be obtained on the original hearing, because at that time White had not offered to this witness to sell any of the property in controversy for
501 business purposes and speculative prices.

The REGISTER and RECEIVER: Do I not understand you to object to his asking the question that is outside the date of November, 1897?

Mr. LAMAR: Yes sir.

The REGISTER and RECEIVER: I sustain that objection on the ground that according to the sixth matter which we have under consideration, "Did White, between the dates last named, enter "into any contract or writing," and the scope of our inquiries are governed by those two dates. After that he can amend his question to confine it to 1897.

Contestant excepts.

Q. State whether or not a necessity existed in November, 1897, for a town and business buildings on the land in controversy?

Mr. LAMAR: We object to the question on the ground that it is irrelevant to the inquiry and it has not been shown that the witness is an expert on townsites, and further because it calls for an opinion.

Objection overruled. Exception taken.

A. Yes.

Q. State whether or not the same necessity for the existence of a town and business enterprise on the land in controversy existed in November, 1867, as it existed in November, 1895.

A. Yes sir.

Q. State whether or not a greater necessity for a town and business enterprises existed on the land in controversy in November,
502 1897, than existed there in November, 1895.

Mr. LAMAR: We object as suggestive and leading.

Objection overruled. Contestee excepts.

A. It existed owing to the general development of the surrounding country.

Q. What was the value of Whitcomb Bros. and Nagel's store on lot one, block ten, north of the railroad right of way, on the 29th of November, 1897?

A. About $2,000.

Cross-examination.

By Mr. LAMAR:

Q. Mr. Nagel, in fixing the value of Whitcomb Bros. & Nagel's store do you make a general estimate or did you have in mind the actual cost of the buildings themselves? In answering this question, your attention is called to the statement in the affidavit of M. P. Whitcomb, your partner, dated June 21, 1897, in which he said they cost about $1500.

A. It is the actual cost that I refer to, the actual cost of construction of the building.

Q. Where did you get that information from? Have you consulted your books?

A. I was a partner in the firm of Whitcomb Bros. when the building was constructed.

Q. Do you mean to say that he was right in saying it was $1500 or you were right in saying it cost $2000?

A. My estimate is the figures I have given.

Q. Your estimate?

503 A. Yes sir.

Q. But do you mean to say that you are basing it upon actual cost? Now what I want to get at is, did you examine your books and determine the actual cost to be $2000, or did you simply estimate it?

A. Estimated it.

Q. You may be right and he wrong, or he right and you wrong, at $1500 or $2000?

A. The items of the cost include anything that entered into the construction of the building. They were not all itemized in keeping the books, and on that account a fair estimate of the value of the building is the figure I have given.

Q. The lumber of which this building was constructed was taken from your mill, was it not?

A. Yes, the mill belonged to the firm at the time.

Q. Did you charge up the price at which you sold lumber?

A. Yes sir.

Q. Then, taking the price that it cost you, making a profit on your lumber, the house would have cost less than $2000. Is that right?

A. It might have been.

Q. Mr. Nagel, this building, Butler's saloon and hotel which you value at $1000 after 1895, and before 1897, did your firm not become owners of these buildings, the Butler buildings?

A. I believe so.

Q. What did you pay Butler for these buildings?

A. I don't remember exactly.

504 Q. You did not pay him any thousand dollars did you?

A. No sir.

Q. How much less than $1000; did you pay him $350?

A. $350 less than $1000, do you mean?

Q. No, did you pay only $350?

A. It was more than that if I remember.

Q. How much more?

A. It was between that and five hundred, at least.

Q. Between that and $500?

A. Near that any.

Q. Is it not a fact that your mortgage on those buildings called for $350?

A. I am not positive.

Q. You are not positive, but you bought it in for that mortgage, did you not?

A. I am not positive; there was money paid additional.

Q. Prior to 1897, did your firm not sell those buildings to J. S. Foreman?

A. I believe so.

Q. What did Foreman pay for them?

A. The same.

Q. What did he pay your firm for them?

A. The particular sale was made by Whitcomb, between Mr. Whitcomb and Foreman. I am not positive of the amount Foreman paid for them.

Q. Your partner reported to what it was.

505 A. Yes.

Q. It is in one of the affidavits here that it was $350. Might not that be correct?

A. It is more than that. That is as near as I can remember the price that was paid to Butler for the buildings, was the same price as realized from Forman out of the buildings.

Q. The price did not exceed $500, though.

A. I could not state positively.

Q. When was that mortgage which you made reference to, from Butler to you, made?

Mr. HEITMAN: I object as irrelevant, incompetent, immaterial, not giving any light as to the value of the property mortgaged.

Objection sustained. Contestee excepts.

A. It was in December, 1896, or January, 1897, as near as I can remember. I am not positive.

Q. I had reference to the mortgage, not the sale. When was the mortgage made?

A. Oh the mortgage?

Q. Yes.

A. I can't answer the question.

Q. How soon was it made after Mr. Butler placed his buildings on the land off of the right of way?

Mr. HEITMAN: I object as immaterial and irrelevant.
Objection sustained. Contestee excepts.

A. It was made subsequent to 1894, between 1894 and 1897. That would cover the dates fully.
Thereupon a recess was taken until 1 o'clock p. m.

506 Hearing resumed at 1 o'clock p. m. The register and receiver, and the same counsel as before, being present.

JOHN G. NAGEL, cross examination resumed, by Mr. LAMAR:

Q. Mr. Nagel, the Edwards house that you referred to is located on which of the lots mentioned?
A. The house is located, as near as I can understand, on both of the lots, in the center.
Q. Mr. Nagel, with reference to the building on lot 9, block 9, you say it was moved there by Tom March and Rube Johnson. Will you not please refresh your memory if you can and state whether it is not true that it was Mr. March who did the work in connection with the building of the house?
A. He worked on it.
Q. You sold the lumber, did you not?
A. Yes.
Q. Who ordered the lumber?
A. The lumber was charged to Mr. Johnson.
Q. On his own or on March's account?
A. On his own account.
Q. Have you your books showing that?
A. No, not here.
Q. Do you keep books?
A. I do.
Q. Do you mean to say your books show this as originally sold to Johnson?
A. Johnson; Johnson paid the bill.
Q. Johnson paid you for it?
A. Yes sir.
507 Q. In regard to this lumber you referred to, additions made to the house which was originally moved by March from the right of way there?
A. Yes sir.
Q. When were those additions put there?
A. They were put there shortly after.
Q. The same year?
A. Yes the same year, after the building was moved, the additions were made; it was shortly after.
Q. Mr. Nagel, did not March have charge of the moving of the buildings from the railroad right of way to the lot the old original building; that is true, is it not, that March had charge of it?
A. He was working, assisting in the moving.
Q. Who was assisting in the moving?
A. Mr. March. Whether he was in complete charge of it I could not say. He was working for Johnson, If I am not mistaken.

Q. How do you know he was working for Johnson?
A. Because he made that his home.
Q. Made what his home?
A. With the family of Johnson, was the place where he was stopping.
Q. Yes, but the family of Johnson could not live in this house until the house was built, could they?
A. They were living in another house at the time.
Q. What house?
A. I don't know whether they were living in town there, or whether it was out on the ranch.
508 Q. Do you mean to say that March and Johnson were living together, when this house was built?
A. When the house was built, yes sir, as near as I can remember.
Q. Is it not a fact, Mr. Nagel, that March helped remove the Forman house and received from Gorman this other house that was on the right of way and was placed on the lot where you have stated?
A. Not as I understand.
Q. Do you know of your own knowledge that that is not a correct statement with regard to the construction of the original house?
A. I could not say.
Q. You could not say?
A. No.
Q. Then you don't know whether March was the man that built the original house and got it from Forman or not. All you know is that, when you sold lumber for the addition thereafter to be made you charged that on your books to Johnson?
A. Yes, and have additional information.
Q. Of your own knowledge?
A. No.
Q. Well, don't state it.
A. Of my own knowledge, yes. I have seen a bill of sale.

Mr. LAMAR: I object to his stating that he has seen a bill of sale. The best evidence of that is the production of the bill of sale.
509 Mr. HEITMAN: It is not in his possession; he can not control it.
The WITNESS: It is not in my possession.

(Cross resumed:)

Q. Whose possession is it in?
A. It is in Mr. Johnson's possession.

Mr. LAMAR: It is in existence, and I object to any testimony with regard to it, as the bill of sale itself is the best evidence.
Mr. HEITMAN: I submit if this witness saw the bill of sale and knows that it was in existence, it not being his bill of sale, he can testify as to when he saw that from his personal knowledge. If the bill of sale belonged to him, then he would have to produce it, but he has no control over another man's papers. I contend he should state whom that bill of sale was from, and when given, and if it covered this property, if he saw it.
Mr. LAMAR: But it is a well established principal of evidence that

the contents of a written paper can not be given when the original paper itself is in existence. Later on the production of that might be made by Mr. Johnson.

The REGISTER and RECEIVER: According to the established rules of evidence, secondary testimony in regard to a written instrument is not admissable, unless the instrument is lost or something of that nature.

Mr. HEITMAN: I contend he should state whom that bill of sale was from and when given and if it covered that property, if he saw it.

510 The REGISTER and RECEIVER: I think he has a right to state whom it purports to be from.

Contestee excepts.

By Mr. HEITMAN:

Q. Go on and state whom that bill of sale purports to be from and to whom it was given and what it covered.

Mr. LAMAR: I don't think he has a right to the contents of it.

Mr. HEITMAN: If it does not cover this house, I think it is immaterial.

The RECEIVER and REGISTER: When they were speaking of the house, it referred to the house, and it should be used in connection with the house and therefore included it.

Q. Go ahead.

A. The bill of sale which I have reference to transfers the house from Forman to Johnson.

Mr. LAMAR: The objection as to the statement of the contents of the paper is renewed and opposing counsel is called upon to produce the paper in possession of one of his witnesses, and that the answer be stricken out.

Objection sustained. Exception taken.

(Cross resumed:)

Q. The house spoken of as being on lot 8, block 9, belonging to Whitcomb Bros. & Nagel is the house which Hasselroth moved off the right of way and lived in for a while?

A. That is the house that is located partly on the street.

511 Q. Yes partly on the street; that is the one that Hasselroth lived in for a time?

A. It was lived in by the Whitcomb Brothers & Nagel; they occupied it for a while.

Q. By whom is it occupied now?

A. It is occupied by the family of Mr. Lloyd.

Q. Mr. John Lloyd. Will you state the name of his wife?

A. I generally know.

Q. Is it Emma Lloyd?

A. It is not Emma; it is Daisy.

Q. What is the size of his family?

A. Consists of a wife and two children.

Q. The house we have just referred to, the March house that I

spoke of a while ago, who is it occupied by now—I don't mean now, but by whom was it occupied in November, 1897?

A. By Mr. Johnson and his family, if I remember right.

Q. Give the number of people in the family each time?

A. Reuben Johnson, his wife, and Tom March, in 1897.

Q. Are you willing to swear that Reuben Johnson was not living on his farm on November 29, 1897?

A. I am positive at this time he was living in that house.

Q. Living in that house?

A. Yes.

512 Q. *On* November, 1895, who was living in what you speak of as the Butler house, on lot 8, block 9?

A. The main building?

Q. The people; every body that was in there; we are getting at the number of inhabitants now?

A. There was a Mr. Butler and Mrs. Butler and Dr. Boyd.

Q. The Jason Edwards house, in 1895, who was living in his house?

A. Mr. Edwards, Mrs. Edwards and one child.

Q. Who was living there in November, 1897?

A. The same people.

Q. In the Butler hotel — saloon building, on lot 10, block 9, who was living there then in November, as permanent persons?

A. Mr. and Mrs. Butler used it as a business place.

Q. Is that the same Mr. and Mrs. Butler you spoke of as residing in the other house?

A. There were two Butlers at that time. One was married that I mentioned, and a single man.

Q. A single man living there in this hotel or saloon. Now, in the Whitcomb-Nagel store building on lot 1, block 10, there was nobody living there in November, 1895, was there?

A. Mr. John Whitcomb, a member of the firm, was sleeping in the house then.

Q. Was he still there in November, 1897?

A. I think so.

513 Q. Who was living in this Butler saloon in November, 1907?

A. Mr. and Mrs. Forman and two children.

Q. That was the house I referred to in connection with Hasselroth living in it, who was living in that house in November, 1895?

A. Mr. Hasselroth and family.

Q. State who was in his family.

A. Mr. and Mrs. Hasselroth, and there must have been five or six children.

Q. Who was living there in November, 1897?

A. I think it was a Mr. Barton and his wife.

Q. The barn building, which you mentioned as being between blocks 9 and 5, is that a log house?

A. It is a log house.

Q. Is it not a fact that that is on lot 8, and not on the street? Look there a minute; we want to locate it.

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A. (Referring to map.) It is partly on the street and partly on the lot.

Q. There was nobody living in that barn in 1897, was there?

A. No, except the horses.

Q. The house situated between blocks 10 and 6, who was that occupied by in November, 1895?

A. By Mrs. B. F. Lloyd, I think, and two of her daughters.

Q. In November, 1897, by whom was it occupied?

A. It was occupied by E. F. Lloyd and one of her daughters.

514 Q. She has since taken up a homestead, has she not, this Mrs. Lloyd?

Contestant objects as immaterial and irrelevant.

Objection sustained. Exception taken.

Q. That building you have just spoken of occupied by Mrs. Lloyd is known as the Vinton building, isn't it?

A. Yes sir.

Q. The same frame building in the street between blocks 10 and 6 was occupied by whom in November, 1895?

A. I think it was occupied by T. B. McWilliams and A. Snow.

Q. By whom in November, 1897?

A. By the same parties.

Q. Will you state whether their residence was continuous during that time, between 1895 and 1897?

A. Almost so. Both of those men worked more or less prospecting and mining, when they would be absent.

Q. They kept their powder *and* etc., in the building and came back and forth—they did not keep this powder in this building?

A. There might be times when they kept some powder in there, but they used it as dwelling, as a residence.

Q. That is, they slept there when they were there?

A. Yes sir, and cooked there.

515 Q. Mr. Nagel the post office building you mention as being on lot 3 in block 10, is that building still there?

A. No.

Q You have torn it down?

A. Yes.

Q. Who was living in it in November, 1895?

A. Mrs. Thibadeau and daughter.

Q. She is no longer there?

A. No.

Q. Mr. Nagel, what did you do with the lumber when you tore that down?

A. I sold it to a man by the name of Waite.

Q. For how much?

Mr. HEITMAN: I object as immaterial and irrelevant.

Mr. LAMAR: He said this building was worth 160 dollars, and I am trying to ascertain whether that is a correct estimate.

Mr. HEITMAN: I understand the building was there in November, 1897.

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Mr. LAMAR: He said this building was worth 160 dollars, and I am trying to ascertain whether that is a correct estimate.

Mr. HEITMAN: I understand the building was there in November, 1897.

Mr. LAMAR: No, November, 1895, and has been torn down since?

Mr. HEITMAN: Yes, sir; it was torn down between that and November, 1897.

Mr. LAMAR: I understand so. I was in error, I was?

A. It was subsequent.

Q. What I want to ask you is in testing the value.

Mr. LAMAR: I think that would be a proper question, however, as to its value.

516 The REGISTER and RECEIVER: Was the building there in existence in 1897?

Mr. LAMAR: He says it was. I asked the witness what he got for the building when torn down, to determine what it was worth.

Objection sustained.

Q. Who was living in that post office building in November, 1897?

A. Mrs. Thibadeau and her daughter.

Q. Now, Mr. Nagel, you have spoken of the residences of Mr. M. P. Whitcomb, south of the railroad. Who was living there in November, 1895?

A. Mr. M. P. Whitcomb and his family, consisting of wife and one son.

Q. Who was residing there in November, 1897?

A. The same people, as near as I can remember.

Q. Mr. Nagel, in regard to that Whitcomb residence, will you state what lot it was on there. You stated it was lot 35, block 11. There seems to be no such lot.

A. We corrected that later on.

The REGISTER and RECEIVER: That was corrected to lot 10.

Q. Is it not a fact that some of those buildings extend over west on to the railroad land?

A. They did in 1895, not the residence, though.

Q. Now the fence which you mentioned, the north fence to that place, where does it run along, how far from the center of the railroad track?

A. I think it is 200 feet from the railroad track.

517 Q. Now, Mr. Nagel, were the improvements you referred to of Whitcomb's as of 1897, did you have in your mind the improvements as they existed in November 1897, when you put these estimates on improvements?

A. I did.

Q. Now that cellar of Whitcomb Brothers & Nagel on lot 7, block 5, that was a root cellar, was it not?

A. It was built for that purpose.

Q. There did not anybody live there in 1897, did they?

A. No.

Q. Now Mr. Shindler's house, you say that was placed there in October, 1897. Are you certain about that time?

A. It was either in the month of September or October, as near as I can remember, not later than that.

Q. 1897?

A. Yes sir.
Q. Are you certain it was there prior to 1897, are you?
A. Quite sure.
Q. Where was that house originally erected?
A. It was erected on a portion of my homestead.
Q. On a part of your homestead, on one of the lots that you laid
ut there originally?
A. No, it was Schindler; he is a brother in law of mine and had been working for me.
518 Q. So he moved it over the line from your homestead claim on to this property?
A. That is all right.
Q. Who was living in that in November, 1897?
A. Mr. Schindler.
Q. Just he alone?
A. Yes sir.
Q. Was Mr. Schindler living in the alleged townsite in October, 895?
A. No.
Q. I mean November, 1895?
A. No.
Q. Nor at any time between November, 1895, and November, 897?
A. No up to the time when he had moved his buildings?
Q. Yes.
A. No.
Q. Now, the Walter Fleming house that you state is on lots 10, nd 11, block 5, which of these lots is that on or was it on in No- ember, 1897?
A. I think it is placed in the center of those lots, or near the cen- er.
Q. Now what time was that building placed there: are you cer- ain that it was placed there in October, 1897?
A. Prior to that it was placed there.
Q. You stated in your testimony it was placed there in October, 1897. Is that correct, or what you said just now?
19 A. It was prior to November.
Q. Who was living in the Fleming house in November, 897?
A. Mr. Walter Fleming and his wife.
Q. Now, the Peter Larson house, on lot 14, block 5, who was liv- ng there in November, 1897?
A. I think it was Mr. Larson himself.
Q. Now, Mr. Nagel, you have stated in your answers on cross ex- mination in detail all of the persons who were living in these sev- ral houses off of the right of way, not including White's, both in October, 1895, and October, 1897, have you not?
A. Yes.
Q. And these people, according to your answers, are thirty in 895 and 26 in 1897: therefore your estimate of a larger number as not as correct as your specific estimate, was it, as to the people?

A. It don't appear so.

Q. Now, this George Roberts business. The fence of George Roberts extended over onto your homestead, does it not?

A. It does.

Q. And was it in the limits of the lease which you have given him for those lots?

A. Yes sir.

Q. What is that?

A. I did not execute no lease for that portion that extended over onto my homestead.

Q. Did you not admit in your prior hearing that you leased
520 it to him according to the plat, your old original plat?

A. I did, what I did lease to him.

Q. Where did you then know where the survey line would come and cut off which was to be shown by the survey later?

A. The lots that I leased to Mr. Roberts were beginning 100 feet from the right of way and extending back 125 feet and this orchard a part of this orchard extended still further back.

Q. But did you not subsequently surrender to him the possession of the land which was surrounded by his fence, extending over to your homestead?

A. I did not.

Q. Mr. Nagel, the plat of your supposed townsite here does not purport to cover the land which you speak about in connection with Mr. Roberts?

A. These lots I leased to Mr. Roberts ran 100 feet from the track.

Q. I am talking about this that you are talking about, this business here (referring to plat); you speak of it as lots on this plat: is it a matter of fact subdivided into lots, the part that you are talking about of Roberts that extended back off the right of way?

A. The lots that I leased him extended back here. Illustrating on plat.

Q. But what you are talking about as being lots in your testimony according to this plat as a matter of fact are not shown
521 on the plats as being lots are they?

A. On this plat.

Q. Yes are they platted into lots there?

A. Yes sir.

Q. How do you tell what the number of this last lot is; has it any number on the plat?

A. No it would be lot 3.

Q. Now Mr. Nagel that pig pen that you referred to as being Roberts' as a matter of fact is on your homestead is it not?

A. No sir.

Q. I mean in 1897 was that pig pen lot on your homestead that you referred to in your testimony?

A. There was a pig pen there too, besides that; that was not the one I had reference to when I enumerated that.

Q. You mean to say that in 1897 Mr. Roberts had two pig pens?

Q. Yes sir; he was quite a hog breeder.

Q. Where was that other pen?
A. It was a short distance back of the building.
Q. Now, with the exception of the privy building, is it not a fact that all of these other Roberts buildings about which you have testified were wholly on the right of way in 1895 and 1897?
A. The residence or dwelling mentioned as partly on and partly off the right of way.
Q. You have reference to the hotel building?
Q. Yes.
522 A. Yes.
Q. As tenants of March?
A. They are related to Mr. Johnson; those people are related to Mr. Johnson.

By Mr. LAMAR (cross resumed):

Q. Now, Mr. Nagel, refreshing your memory, is it not a fact that Mr. Cosart was in the butchers' business and living at Hope at that time, in partnership with Nicholson.
A. No sir.
Q. He was not?
A. That was previous to that; he was in the butcher business previous to that.
Q. Now, Mr. Nagel, you would not be certain about this matter? Neither side ought to want anything on the record that is not a fact. I want to give you a full chance to refresh your memory and get these facts correct. Are you satisfied that Cosart and his family were living in this March house on November 29th, 1897?
A. I am quite positive?
Q. You are quite positive?
A. Yes sir.

Redirect examination.

By Mr. HEITMAN:

Q. When was the house referred to as the Reuben Johnson house moved from the right of way onto the townsite?

Mr. LAMAR: He stated that in his original testimony.

523 A. They were on the right of way.
Q. They were on the right of way?
A. Yes.
Q. Mr. Nagel, you have spoken of charging the lumber of this the March building up to Reuben Johnson on your book. Was it not a fact that at that time Reuben Johnson and yourself were in the lumber business together, in that he was hauling logs to your mill?
A. He furnished us with timber and logs previously.
Q. And this came up in connection with the account between you and him?
A. Certainly.
Q. Then he was hauling logs to you at that time in 1897, the fall?
A. Yes sir.

Q. Now, while he was hauling those logs to you, now don't you remember, since your mind has been refreshed that he was not living in the March house but was living across the river?

A. That is correct.

Q. He was living across the river and not living in the March house?

A. That is correct.

Q. And was not living there in November, 1897?

A. That is correct. There was a Mr. Cosart living in the house, Mr. and Mrs. Cosart and their daughter.

By Mr. GRAHAM:

Q. In 1897?

524 A. 1894.

Q. When was the addition to this house built, the addition that you furnished the Johnson for?

A. Immediately after the house was moved to its present location.

Q. When was Mr. Schindler's house moved onto the townsite?

A. In September or October, 1897.

Q. In September or October, 1897. How large a family did Mr. Schindler have at that time, in November, 1897?

A. Mr. Schindler is a single man.

Q. Was he occupying the house at that time?

A. He was.

Witness excused.

M. P. WHITCOMB, a witness produced on behalf of contestant, being first duly sworn, testified as follows:

Direct examination.

By Mr. HEITMAN:

Q. State your name, residence and occupation.

A. M. P. Whitcomb, Clarks Fork, Kootenai county, Idaho.

Q. You have been sworn, have you Mr. Whitcomb?

A. Yes sir.

It is stipulated that Mr. M. P. Whitcomb was in the vicinity of Clarks Fork since about the fall of 1890, and that he is

525 acquainted with the land in controversy.

Q. Do you know of your own knowledge what portion of the land in controversy was included within the claimed townsite settlement at the time of the allowance of John E. White's homestead entry on November 27th, 1895?

A. Yes sir.

Counsel for final entryman admit that on November 27th, 1895, there were building improvements, substantially as described by the witness John G. Nagel (except as to values) on the following lots and blocks, to-wit:

Lot 1, block 10, Whitcomb Brothers & Nagels store, also November 29th, 1897.

Lot 10 in block 9, known as the Butler building, occupied as a saloon and hotel. It is not admitted that it was occupied as a hotel in 1897.

Lots 1 and 2, in block 9, with leave to show the residence is on lot 1, and that the same was there in November, 1897.

Lot 8 on block 9, Butler Brothers, lot 9 in block 9 moved in the spring or summer of 1897 to either lot 10 or 11, in block 5; Lot 10 in block 9 partly in the street and dividing blocks 5 and 9 owned by Whitcomb Brothers & Nagel; building on street between blocks 9 and 5; Lloyd building in street between blocks 10 and 6, and that it was there in 1897; street dividing blocks 10 and 6, frame, story building; lot on street between blocks 10 and 6, Whitcomb &
526 Hutton building, and that it was there in 1897; lot 3, block 10, known as the post office building, owned by J. G. Nagel, and there was on the land November 29th, 1887, the root cellar on lot 7, block 5. As to the Fleming house it will be admitted, that the building was in November, 1897, principally on lot 14 in block 5.

Counsel for both sides stipulate that the Larson house, instead of being where it is located by Mr. Nagel in his testimony, was on lot 13 in block 5, known as the Larson house, owned by Whitcomb Brothers.

It is admitted also, that the parties stated by Mr. Nagel to have been residing in various buildings, both in November, 1895 and November, 1897 are substantially correct, as to the buildings embraced in this stipulation or admission.

Mr. HEITMAN: We don't admit Mr. Nagel's evidence on cross examination about the occupancy of the March or Johnson building It is also agreed that further competent testimony may be taken on the subject as to the occupancy of the Johnson residence, mentioned above as the March residence.

Counsel for final entryman for convenience has referred to what is marked as contestant's Exhibit "D," but does not wish to be understood as conceding that by the use of the words "lots and blocks" to admit that the parcels of land referred to are lots and blocks in contemplation of law.

(Direct resumed:)

Q. Just state what portion of the land in controversy was
527 included within the claimed townsite settlement November 27, 1897.

A. The entire northwest quarter of the southwest quarter of section two, township 55 north, range 2, east of Boise meridian, containing forty acres.

Q. What portion of this land was surveyed and platted into lots and blocks at the time of the initiation of the townsite proceedings?

Mr. LAMAR: I object to that on the ground that the plat and the records submitted at the prior hearing are the best evidence as to what was platted; and second it has relation to something done necessarily prior to November 27, 1895, as the plats were on that day filed in the local land office.

Mr. HEITMAN: I suggest this, how easy it would be for this witness to refer to contestant's Exhibit "A," already introduced in evidence.

The REGISTER and RECEIVER: Your question was leading up to what was the character of the land in controversy in 1895?

Mr. HEITMAN: Yes sir.

Mr. GRAHAM: He has already identified this plat in his former testimony.

The REGISTER and RECEIVER: I will not have cognizance of the former testimony, only it is to be taken into consideration in the decision. Therefore I overrule the objection.

Exception taken.

A. I don't know whether I fully understand the question.
528 Just include this here and this (referring to plat).

Q. That is the question, what was platted off?

A. I would say about three fourths of the forty acres, as shown by contestant's Exhibit "A" introduced in evidence on the former hearing.

Q. Where was the store of Whitcomb Brothers & Nagel, mentioned in Mr. Nagel's evidence and in the stipulation heretofore made, situated on November 27, 1895, and on November 29, 1897?

A. On lots 1 and 2 of block 10.

Q. What was the value of this building November 27, 1895?

A. I would say in the neighborhood of $2000.

Q. What was its value on November 29, 1897?

A. In the neighborhood of $2500.

Q. State why the value appreciated.

A. On account of fixtures and things put into the building, being parts of the building.

Q. What was its value on November 27, on November 27, 1895, of the building on lot 10 in block 9 known as the Butler saloon and hotel?

A. I would say about $2000.

Q. What was its value on November 29, 1897?

A. In the neighborhood of $2,000.

Q. For what purpose was this building used in November, 1897?

A. I think as a hotel only: I think there was no bar in connection with it, no saloon.

Q. What was the value in November, 1895, of the Ed-
529 wards building, situated on lots 1 and 2 in block 9?

A. From $200 to $250.

A. From $200 to $250.

Q. What was its value in November, 1897?

A. I would say about $50 more, or about $250 or $300.

Q. Just state in connection what was the cause of the increase.

A. I would say from $250 to $300 in 1897.

Q. State in that connection what caused the increase in value.

A. Other buildings erected on the grounds within the enclosure.

Q. What was the value in November, 1895, of the frame building on lot 8 in block 9, owned by the Butler Brothers?

A. I would say from 150 to 200 *hundred* dollars.

Q. What was its value in November, 1897?
A. About the same, $150 or $200.
Q. To refresh your memory, was that building standing there in November, 1897?
A. Yes sir, to the best of my recollection; I am not positively certain it was.
Q. What was the value, in November, 1895, of the frame building on lot 9 in block 9, used as a dwelling by Joseph Butler?
A. I would say about $100.
Q. What was its value in November, 1897? (The witness here examines memorandum.)

530 By Mr. LAMAR:

Q. What is it you are referring to
A. It is a list that I have made up, that is all.
Q. Who made it up?
A. I made it up myself; it is my own individual property, in my own handwriting, my own figuring. I have made a list of some of this property, and I am simply refreshing my memory on it, that is all.

Mr. HEITMAN (direct resumed):

Q. Well state that is the Butler residence, the Joe Butler residence?
A. About $250.
Q. What was the value in November, 1895, of the building on lot 10, block 9, owned by Whitcomb Brothers & Nagel, used for a dwelling?
A. That is the building partially in the street there?
Q. Yes, partially in the street, dividing blocks 9 and 5.
A. From $200 to $250 somewhere.
Q. What was its value in November, 1897?
A. About the same.
Q. What was the value, in November, 1895, of the building in the street dividing blocks 9 and 5 belonging to Whitcomb Brothers & Nagel used as a barn?
A. I would say about $100.
Q. What was its value in November, 1897?
A. The same thing.

Q. What was its value, in November, 1895, of the frame
531 building in the street dividing blocks 10 and 6, owned by Mrs. Lloyd?
A. About $500.
Q. What was its value in November, 1897?
A. The same thing; no change in it.
Q. What was the value in November, 1895, of the frame building in the street dividing blocks 10 and 6 used as a building?
A. This is in 1895?
Q. That is the Whitcomb & Hutton house?
A. About $100.
Q. What was its value in November, 1897?
A. About $250.

Q. What was the cause of the increase in value?
A. The addition built on, general improvements made.
Q. What was the value in November, 1895, of the building on lot 3 in block 10 used as a post office?
A. About $100 or $150.
Q. What was its value in November, 1897?
A. About $200; $150 or $200.

Thereupon an adjournment was taken to tomorrow, March. 28th, 1902, at 9:15 o'clock, a. m.

FRIDAY, *March* 28, 1902.

Hearing resumed at 9 o'clock a. m. with the same parties present as before.

Thereupon, M. P. WHITCOMB resumed the stand and his direct examination was continued, as follows:

Mr. LAMAR: Counsel for final entryman call attention to
532 the fact that the alleged bill of sale referred to relative to the March house on yesterday has not been produced, and it is requested that witness Nagel be advised not to leave the city until after it is decided whether or not he is to be further cross examined upon the production of the alleged bill of sale.

Counsel for final entryman also call for the production of the books to which reference was made by Mr. John G. Nagel in his testimony, and ask that, if the same are not here, that they be telegraphed for forthwith.

Mr. HEITMAN: Mr. Nagel will be here until this examination is closed. With reference to the books, I don't know, it depends upon whether they can be obtained. We will take that up when we come to it.

Mr. LAMAR: As there is now plenty of time for the books to be received from Clarks Fork a demand is made for the production of those books, in so far as they relate to this March house, covering the period from November 27, 1895, to November 29, 1897.

By Mr. HEITMAN:

Q. What was the value of the buildings owned, occupied and used by George Roberts as a saloon and hotel on November 27, 1895?

Mr. LAMAR: Will you specify, so as to save time, whether they were on or off the right of way?

Mr. HEITMAN: It is admitted these buildings were on the right of way at that time.

A. (Referring to memorandum). The Roberts hotel,
533 saloon and a store building I valued at about $2000.

By Mr. LAMAR:

Q. When,
A. In 1895.

By Mr. HEITMAN (direct resumed):

Q. For what purposes were they used at that time?

A. The hotel was used for hotel purposes, the saloon for saloon purposes, the store room for stock of merchandise.

Q. What was the value of those buildings in November, 1897?

A. I will say about the same, $2000.

Q. For what purposes were they used in November, in 1897?

A. The same purposes as in 1895.

Q. State whether or not there were any other buildings on the land in controversy in November, 1895, owned by George Roberts?

A. Yes sir, there was a small building back of the saloon building.

Q. What kind of a building was it?

A. Used as a residence, a one story frame building.

Q. Describe its situation, whether it was on the right of way or townsite?

Mr. LAMAR: We object as leading and suggestive.

A. Partially on the land in controversy and partially on the right of way.

534 Q. State whether or not it was occupied in November, 1895?

A. It was as a dwelling house, I believe.

Q. What was the value of this building in November, 1895?

A. About $100, I would think.

Q. State whether or not this building was on these lots in November, 1897?

A. Yes sir.

Mr. LAMAR: You say these lots?

Mr. HEITMAN: I understood him to say it was partly on the right of way and partly on the lots.

Q. For what purpose was it used in November, 1897?

A. I think as a dwelling house.

Q. What was its value in November, 1897?

A. About $100.

Q. State whether or not in November, 1895, George Roberts had any other improvements on the land in controversy.

Mr. GRAHAM: We ask that the witness be cautioned that the land in controversy is outside of the right of way.

Mr. HEITMAN: The register and receiver has not so held, but on the contrary he has withdrawn his ruling and allowed evidence to be introduced showing the improvements on the right of way.

Mr. LAMAR: I don't understand that the register and receiver have changed their ruling in regard to that matter, but merely
535 permitted the testimony in regard to improvements on the right of way to be taken down.

Mr. HEITMAN: Here is the ruling: "Any ruling I have made in regard to the right of way will be withdrawn, and I will receive evidence regarding these buildings, no matter where they are located; in cross examination the other side can bring out whether they are on the right of way."

The REGISTER and RECEIVER: That is exactly what I stated.

Mr. LAMAR: Simply let the testimony come in, but you did not pass on the right of way being in the controversy?

The REGISTER and RECEIVER: At the time.

A. Yes sir.

Q. Well, go on and state what they were?

A. He had store room—I call it a store room or warehouse.

Q. Well, state where it was situated, and describe and give its value?

A. Situated alongside of his store building.

Q. Well, just state whether it was on or off the right of way.

A. On what was claimed as the right of way, on the two hundred foot strip right of way.

Q. Go right along and give its character and value in answering the one question. It will save a good deal of time.

A. It was a one and a half or two story building, the upper part of it used as a lodging house or something of the kind, a
536 rooming house, and the lower portion used as a warehouse in connection with his business. I will say valued at four or five hundred dollars.

Q. When?

A. In 1895.

Q. In November 1895?

A. In November, 1895; also the same in November, 1897.

Q. State whether or not there were any other improvements owned by Roberts?

A. He had a woodshed that he built, I think, in 1896, if I remember, in 1896; it was partially on the right of way and partially on the townsite, value about $75 or $100 or something and shingle roof.

Q. Specify the date of this value.

A. That was in 1897, because it was built I think in 1896.

Q. November, 1897?

A. November, 1897. He had some other outbuildings I don't hardly remember what; I was not round the place to notice particularly; the enclosure that his building, etc., was a tight board fence on the next side to us, next to our store rather, that extended back clear across the government land on this townsite and enclosed his outbuildings, his orchard and any other buildings he might have; I hardly know what he did have. The fence and orchard and other buildings were there in November, 1895; they were also there in November, 1897.

537 Q. Can you give the value in November, 1895?

Mr. LAMAR: You mean all of them?

Mr. HEITMAN: Yes sir.

Mr. LAMAR: You have already given it in detail haven't you?

Mr. HEITMAN: Yes sir.

A. I would hardly know the value of his outhouse that he had there; I should say it was twenty-five or thirty dollars. He also had a force pump for fire protection set in a well that he had dug and curbed up with 100 feet of I should — 1½ inch hose, nozzle, etc., valued at about fifty or seventy-five dollars.

Mr. LAMAR:

Q. Did he value the pump at fifty or seventy five dollars?
A. Yes sir. His orchard was somewhere from perhaps thirty to fifty trees, I would say, and were bearing trees in 1897. I hardly think they were bearing in 1895; they were quite fair sized trees, valued at about $100 or $150 or something.

By Mr. HEITMAN (direct resumed):

Q. When?
A. In 1897, November 1897.
Q. State whether or not there were any other buildings or improvements on this land in controversy in November, 1895.
A. Well, I could not say as to 1895; in 1897 there were, Gordon Daugherty had purchased the property in 1897 and had built a barn, blacksmith shop, etc.

Mr. HEITMAN: The witness did not understand the ques-
538 tion. He thought I was referring to Roberts' improvements.
Mr. LAMAR: That Gordon Daugharty business was all subsequent to the time, was it not?
Mr. HEITMAN: He said it was in November, 1897.

Q. Did I understand you to say it was in November, 1897?
A. Yes sir, November.
Q. Describe where Gordon Daugharty made these improvements.
A. I will designate it on the plat.

Mr. LAMAR: We object to any improvements made subsequent to 1897. I want your question confined to a period anterior to 1897.
Mr. HEITMAN: I don't have to confine it to a period anterior to 1897, but anywhere between 1895 and 1897.

Q. Identify what property he had bought. Your answer is not responsive to my question.
A. I would like to have the map please.

By Mr. LAMAR: Do you understand that those improvements were placed there before 1897 by Gordon Daugharty?
Mr. HEITMAN: No.
Mr. LAMAR: Counsel for the entryman calls on the witness to state whether or not he means that improvements of Gordon Daugharty were placed there prior to 1897; if not, it is asked that his answer be stricken out with regard to improvements of Gordon Daugharty.
539 Mr. HEITMAN: I respectfully suggest that we are getting this thing all mixed up. The cross examination is being interjected into the examination in chief. I think this witness will get it right if counsel will not interrupt us. The answer is not responsive to my question. I thought he was through with the Roberts building, and my question was in direct line with the issue submitted, "What were the improvements there in November, 1895", and now he goes on to state that in 1897 Gordon Daugharty had bought this property, meaning this Roberts property, and had made

some additional improvements. Now if these improvements were not made prior to November 29, 1897, I don't want it in the record.

Mr. LAMAR: He stated on the side there awhile ago they were not.

Mr. HEITMAN: No, counsel is mistaken.

The REGISTER and RECEIVER: Give a direct answer to that first question.

A. My recollection is that Gordon Daugharty had purchased the property in 1897.

Q. What property, identify it.

A. Well, lots.

Q. Mention it as the Roberts property, if that was the case.

A. I hardly understand that; this is left blank where the building stood.

Mr. GRAHAM: I don't understand anybody purchased any land up there, and they are only talking about improvements.

540 What is the use of incumbering the record?

The REGISTER and RECEIVER: Yes, the Roberts improvements is what we are asking about.

The WITNESS: I am not certain about the title to this land (referring to plat), whether Roberts claimed this portion of the ground out here or not.

Q. If Gordon Daugharty bought these improvements, these buildings and other improvements from Roberts in 1897, say so, and then if he made improvements there in 1897, go on and say so, That is what we want to get at.

A. My recollection is that Gordon Daugharty bought this property in 1897 and did make the improvements I speak of, built this barn, blacksmith shop, etc., in the fall of 1897.

By the REGISTER and RECEIVER:

Q. Prior to November 29th?

A. I am pretty certain, yes, that they were made prior to that date.

By Mr. HEITMAN (direct resumed):

Q. Go on and state the improvements that Gordon Daugharty built there and their value November 29, 1897.

A. It was a barn I would say 25 or 30 feet wide, 60 or 70 feet long. One end of the building was used as a blacksmith shop and the balance of the building was used for a barn; I would say worth $100 to $150 or something.

Q. State where this barn was situated.

541 A. On lots 6, and 7 and 8 of the platted townsite of Clark's Fork, in block 10.

Q. State whether or not in November, 1895, there were any other buildings or improvements of any character on the land in controversy? How do you understand the question, that was in November, 1895, which you have not testified about?

A. Yes sir.

Q. Well, describe them.

A. On lot 10 in block 11, south of the railroad track, I had a residence and other outbuildings.

Q. Describe them and their value?

A. Had somewhere from an acre to an acre and one half enclosed in fence, had an orchard of about 100 trees and considerable other shrubbery, and was living upon the ground as my home.

Q. Describe the character of the buildings and improvements and their value.

A. The main building was 16x24, one story high, with a shed on the back that was 14x16, one story high, back of that, connected with the same house. I had another building that was 10x14, all being connected together. I had a chicken house and barn, a one story frame building, shingle roof, and the usual outbuildings. The total value of the dwelling house was about $500.

By Mr. LAMAR:

Q. This was in 1895?

A. Yes sir, 1895. The value of the chicken house and barn was about $100, and I should count the value of the orchard about $250 or $300, the clearing and fencing of the property about the
542 same, about $200.

By Mr. HEFTMAN:

Q. For what purpose were these buildings and improvements used in November?

A. As a residence.

Q. By whom?

A. By myself and family.

Q. What was their value in November, 1897?

A. About the same; perhaps a little more on account of the growth of the orchard, that is about the only difference.

Q. State whether or not there were any other buildings or improvements on the land in controversy in November, 1895?

A. Mr. John E. White had a residence on this forty acres. The residence consisted of a one story frame house, with a hip roof, I think about 30x30. I don't know as to the size, I could not be positive of that. I think he also had a lean-to on the back of the house in 1895, as kind of a shed or something. I don't just remember. He also had a chicken house, think a barn, and had, I don't know, four or five acres perhaps that were slashed off, and I think partially in orchard; don't know how many trees he had, perhaps fifty to one hundred trees, that is fruit trees those would be, and had it enclosed partially with fence, don't know as to clear around. I think he had, though, taken in his field. I think a small garden patch near his house enclosed entire with a rough fence. His dwelling house would value at $400 or $500, and his other buildings at perhaps
543 $100. His orchard I would value at $200 or $300, and his clearing and fencing would amount to $400 or $500.

Q. Did you give their value in November, 1897?

A. I would say the same.

Q. For what purpose were they used in November, 1897?

A. Used as a residence by Mr. White and family.

Q. State whether or not there were any other improvements on the land in controversy in November, 1895?

A. I don't remember of any other now than what we have touched.

Q. Where did Charles Schindler live in November, 1897?

A. In November, 1897, I think his house was on lot 5 of block 5 of the platted portion of Clark's Fork townsite.

Q. What kind of a home was it, and for what purposes was it used?

A. It was a one story frame house with rustic and shingle roof, I would say about 14x20 or something like that for size, used as a dwelling house.

Q. What was its value in November, 1897?

A. I think I made a note of that. About $250 or something, including his fencing and clearing of his ground, etc.

Q. State whether or not there were any other improvements on the land in controversy in November, 1897?

544 A. Walter Fleming, I think, had a house built in 1897 on lots 14 and 15 of block 5.

Q. What was the value of the Walter Fleming dwelling and improvements in November, 1897?

A. About $300 or something.

Q. State whether or not there were any other improvements on the land in controversy in November, 1897, in addition to those you have already mentioned.

A. I merely know what ones we have mentioned.

Q. Where did Peter Larson live in November, 1897?

A. He lived on lot 13; he lived in a house on lot 13, block 5, in the platted portion of Clarks Fork townsite.

Q. Go on Mr. Whitcomb and tell what you know about that.

A. He had a one-story frame house, shingle roof, valued about $100.

Q. When?

A. In November, 1897 and occupied the same as a dwelling house himself.

Q. State whether or not in November, 1897 there were any other improvements of any character, on the land in controversy.

A. There was in the shape of fencing and clearing, etc.

Q. Well, go on and describe.

A. Lots number 16 and 17 on block 5 were enclosed with
545 a good, substantial fence and were under cultivation.

Q. By whom?

A. By T. B. McWilliams.

Q. What were their value in November, 1897?

A. I would say the clearing and fencing was worth $50, or something of the kind. Lots number 7 and 8 in block 4 were cleared and fenced and in cultivation the summer of 1897 by Carpenter Wilson.

Q. What was their value in November?

A. About $70, I would say, the improvements. I am quite positive that lots numbers 4, 5 and 6 in block 4 were cleared and fenced and under cultivation by C. W. Hutton, with a valuation, the fencing of about $75 or something—fencing and clearing, I should have said

there. Lots numbers 11, 12, 13, 14 and 15 in block 4 were under fence and cultivation in November, 1897, by J. B. Whitcomb, with a valuation of I will say, $100 for fencing and clearing. Lots number 7, 8, 9 and 10 in block 8 were fenced, if I am not greatly mistaken, before Nov. 1897, by a man by the name of Oullet, and if I am not greatly mistaken, lots 5 and 6 in block 8.

By Mr. LAMAR:

Q. What was the value of that fence?

A. I would say about $50, the valuation of the fencing; lots number 5 and 6 of the same block, block 8, were under fence by Mrs. E. F. Lloyd, at a valuation of about $25 or $30, or something.

Q. State if you know what the population on the land in
546 controversy was on the 27th day of November, '5.

A. I would say in the neighborhood of fifty.

Mr. LAMAR: Counsel for entryman call attention to the stipulation on page 16 of Nagel's direct examination and ask that witness be cautioned not to include in his answer the inhabitants in the dwellings in respect to which that stipulation covered.

Objection overruled. Exception taken.

Mr. LAMAR: I ask now that the witness be cautioned to specify only *bona fide* residents of the place without any transients.

The REGISTER and RECEIVER: That is what we are after, the character of the occupancy, and that is what he is testifying to and he thoroughly understands that that is what he is testifying to.

Q. State, if you know, what the population of the land in controversy was in November, 1897. State Mr. Whitcomb; give in this population not transient men coming and staying only a night or two or a few days, but the population of men living and working there, doing business there, was?

A. I would say about the same, very little change in the population.

Q. State whether or not if you know the same necessity existed in November, 1897, for a town and business enterprises on the land in controversy as existed at the original hearing of this cause.

Mr. LAMAR: We object, as it calls for an opinion of the
547 witness of the proper foundation or competency and further because leading and suggestive.

Objection overruled. Exception taken.

A. Yes sir, I would state that it did even greater, as the county was filling up with people around the surrounding country improvements being made all throughout; these settlers if deprived of a trading point at Clarks Fork would be compelled to go ten or twelve miles to do their trading. I would consider the necessities of a trading point greater in 1897 than they were in 1895.

Q. State whether or not that necessity exists at the present time.

Mr. GRAHAM: We object to that.

Objection sustained. Exception taken.

Q. State whether or not of your own knowledge who resided in the March house or Johnson house in November, 1897?

A. I am not really positive on that point. My opinion is that Johnson's family lived there.

Q. What Johnson? Give his name.

A. Reuben Johnson.

Cross-examination.

By Mr. LAMAR:

Q. Mr. Whitcomb, will you please designate specifically all of the residents off of the right of way who were there in November, 1895, giving the name and the head of the family and the place they resided, as well as the number of children?

A. This is in November, 1895.

548 Q. Off of the right of way. If you can give them both in November, 1895, and in November 29, 1897, as you go along, do so.

A. Mr. Hasselroth—you want their place of residence?

Q. State where they were living at that time.

Mr. GRAHAM: Give us the lot number, or designate it in some way.

Q. Designate the building, that will shorten it.

A. They were living in a building partially in the street between blocks 5 and 9, in a house owned by Whitcomb Brothers & Nagel. There were eight in the family.

By Mr. GRAHAM:

Q. Was that in 1895 or 1897?

A. Both.

(By Mr. LAMAR, resuming:)

Q. Seven or eight in the family at that time?

A. I think so; that is my recollection. There was Mrs. E. F. Lloyd, living in a house——

Q. Hasserloth, was he there in 1897, too?

A. My idea was that he was.

Q. Go ahead. Mrs. Lloyd——

A. (Continuing)—living in a house in the street between blocks——

Q. You have already stated where Mrs. Lloyd's place was at that time; that is near enough.

A. There was Mrs. Lloyd and two daughters.

Q. Was that in 1895?

A. In 1895, and Mrs. Lloyd and one daughter I think in 1897. There was living in a house in the street between blocks ten

549 and six owned by myself in 1895, four men, Mr. T. B. McWilliams, Mr. A. E. Snow, Mr. Oullet and Mr. Hagino, if I am not mistaken.

Q. That was in 1895?

A. If I am not mistaken at both periods; not only in 1895, I think they were all there in 1897. Also the addition built on this same house in 1896. There was the Hutton family, consisting of

four, that is 1897, they were there in 1897; I am not positive whether they were there in 1895 or not. In the postoffice building, lot 8, block 10 there was Mrs. Thibadeau and her daughter.

(By Mr. GRAHAM:)

Q. When?

A. Both periods, both 1895 and 1897; they were in the Butler building in 1895.

By Mr. LAMAR: (resuming): Which Butler building.

A. Of the Butler Brothers; I will say in the Butler building, the residence building then and not go into the saloon building; there were four, there were five rather.

Q. Who were they?

A. Mr. and Mrs. Joe Butler and an adopted child they called their son, William Butler, and Al Butler, a brother, and Jim Butler, a brother.

Q. That is in 1895. In 1897 that building had changed some; the inhabitants would be in the Butler saloon building then and hotel building.

Q. Who were living, there then?

550 A. Mr. and Mrs. Forman and two children; don't remember who was living in the laundry building in 1895, whether there was anybody or not. In 1897 John A. Lloyd, his wife and one child. In 1897 they were living in the Johnson building on lot 12, block 3. I am not really positive of whether it was Johnson's family themselves or whether it was Cosart; if it was the Johnson family they would be three and if the Cosart family only two; I am not positive as to which parties were living there. In the Peter Larson house in 1897 I think only Larson himself, just one; in the Fleming house in November, 1897, there were three.

Q. State who these three were, if you please.

A. There were Walter Fleming, his wife and one child. The Hutton family in 1897 is one larger than made it.

(By Mr. GRAHAM:)

Q. An increase in the family?

A. Not exactly that; there was a young man living with them. On lot 10 in block 11 south of the railroad track at my own house, (M. P. Whitcomb's) there were five in the family.

(By Mr. LAMAR:)

Q. In 1897.

A. In 1895.

Q. State who they were.

A. There was my wife and one child, my brother John and Carpenter Wilson.

Q. In 1897?

A. In 1897, I think there were only four; Carpenter Wilson was living I think with Schindler at that time. On this same

551 forty acres was the family of John E. White, consisting as I have it, of seven in the family.

Q. In 1895?
A. Yes sir.
Q. Enumerate them.
A. Mr. and Mrs. White—do you want them enumerated?
Q. No?
A. They were the same in 1897. You want the inhabitants on the right of way.
Q. No off of the right of way this question is.
A. The answer to the first question included what was on the right of way as well as what was off the right of way.
Q. Mr. Whitcomb, have you given all of the inhabitants off of the right of way, both in November 1895, and November 27, 1897; if not add such further residents as were there.

Mr. HEITMAN: With reference to his evidence, he mentioned 1897, as well as 1895, as he went along.
Mr. LAMAR: I think he has, but I want to make certain of it.

A. There was in 1895 living in this dwelling house on the Roberts place——
Q. That is not on the right of way?
A. Yes, the dwelling house was partially off the right of way. I could not be positive as to who was living there in 1895; the house has always been occupied, but as to who the occupants were
552 in 1895 I could not say. In 1897 it was occupied by Gordon Daugharty's family.
Q. How many were there.
A. There were Daugharty and his wife and I think five children. Now, did you want the ones on the right of way or not?
Q. You can let that come out on the redirect; we don't care anything about that.
A. There is more that I have not got yet.
Q. Mention all of them off of the right of way.
A. I don't think I got the Edwards family, did I?

Mr. HEITMAN: No.

Q. Put them in.
A. That was on lots 1 and 2 in block 9, the Edwards family, consisting of Mr. and Mrs. Edwards and one daughter.
Q. That is when?
A. That was both in 1895 and 1897.
Q. Now, Mr. Whitcomb, are you certain that Hasselroth was there in 1897? Is it not a fact that he was with Mr. Brown in 1897? and away from there?
A. Mr. Hasselroth himself might have been with Brown, I don't know, but his family was residing in this house November 29, 1897.
Q. Is it not a fact that Mrs. Hasselroth was with her husband at Mr. Brown's and the children were working out at that time, in 1897?
A. It might be barely possible that Mr. and Mrs. Hasselroth and

one of the girls were with Mr. Brown, but it was only tem-
553 porary; their residence was at Clark's Fork, and their home and effects were all there, and their children were all there.

Q. What is the name of this daughter of Mrs. Thibadeau?

A. The daughter of Mrs. Thibadeau.

Q. Yes, that you have reference to.

A. Miss Lennie.

Q. Now, as a matter of fact, was she not in Spokane keeping books in November, 1897?

A. Possibly she might have been there, but her home was with her mother. I know she was in Spokane a little while keeping books at Sloane-Paine & Company, but at that particular time I could not swear positively.

Q. Is it not a fact that Al Butler moved away from Clark's Fork prior to November, 1895?

A. No sir, I think not.

Q. What time did he move away from there?

A. I could not say, but they sold out in December, 1896.

Q. But did not Al Butler leave before the others left?

A. I think not, not to amount to anything, at least I am positive he was there in November, 1895, or November, 1896—on November, 1895, I should say.

Q. Mr. Whitcomb, you said that in November, 1897, there was a child in the family of Walter Fleming. Is it not a fact that Mr. Fleming did not marry until the fall of 1897? Can't you
554 refresh your memory by that fact and tell that this child was not born until after that?

A. No sir, I am pretty positive that the child was born at that time. It was a very short duration.

Q. Is it not a fact that the child was born in January, 1898?

A. I would not be positive on the point. I made no notation of anything of the kind, would not swear positively.

Q. Do you know when he was married?

A. No sir, I could not say as to the date of his marriage; I was not at the wedding myself.

Q. Is not Fleming a relative of yours.

A. Only by marriage.

Q. A relative of your wife?

A. Yes sir.

Q. You owned the frame building, did you not?

A. No sir.

Q. You heard the testimony of Mr. Nagel yesterday relative to McWilliams and Snow being engaged in prospecting in the mountains somewhere and coming back and forth to this residence building. Was what he said on that subject substantially correct?

A. I think so; I don't remember the testimony, but that is their location all right.

Q. They came back and forth to this residence and kept that powder in it and so on?

A. They did not keep no powder in it that I know of; the place belongs to me; rented it to them for years.

555 By Mr. HEITMAN:

Q. They lived there?

A. They had their bedding there and a cook stove there.

By Mr. LAMAR:

Q. Did they not have a cabin in 1897 on Lightning Creek near their camping ground?

A. Possibly had a little shack up there on top of the mountain where they were trapping that winter, I don't remember, but it was that winter, late in the winter. They did trap, made that somewhat of their business.

Q. They had sleeping facilities there with them?

A. I guess they had a quilt or two along with them, sleeping on the ground.

Q. All four of these men are unmarried men, are they not—McWilliams, Snow, Oullet and Hagbo?

A. I think they were all unmarried, both in 1895 and 1897, single men.

Q. Now, this Mrs. Lloyd is a relative of yours.

A. Yes sir she is a sister of my wife.

Q. John Lloyd is a relative of yours?

A. John is a son of Mrs. Lloyd.

Q. And Schindler is a relative of your partner, Mr. Nagel?

Mr. HEITMAN: I object as immaterial and irrelevant.

Objection sustained. Exception taken.

Mr. GRAHAM: We desire to show that a majority of the townsite belonged to the family.

556 Q. Mr. Whitcomb, your northermost fence there on your residence property, will you locate that with reference to the center of the track?

A. Yes sir.

Q. How far was it from the center of the track?

A. Calculated it would be two hundred feet from the center of the line.

Q. Calculated to be 200 feet?

A. Yes sir, it was within a few inches, I forget which it was when they came to survey it.

Q. When did you make that calculation.

A. I think in 1891—no, I did not, either. I will take that back I did not make this calculation in 1891, because I had a hundred feet of the right of way, or something like that in garden for a year or two in front of my house.

Q. But the fence was placed there in 1891?

A. And my walk going out from the fence, because clear out to the old fencing line today it is lying there, the same walk.

Q. When was the fencing put there?

A. The fence was put there in about I think 1893 or 1894, somewhere along there, I could not say positively what date the fence was put there but a year or two after I had located on the ground anyway. I located there in 1891.

Q. Was Mr. John E. White in actual possession of any of this legal subdivision lying north of the right of way at any time between November 27, 1895, and November 29, 1897?

557 Mr. HEITMAN: I object as immaterial and irrelevant, not being in issue or embraced within any of the questions submitted by the department; for the reason that it calls for a conclusion from the witness of what is actual possession; for the further reason that it is not proper cross examination, not having been brought out in the examination in chief.

Objection overruled. Exception taken.

A. I would say so, from my knowledge of the question.

Q. Mr. Whitcomb, you are one of the petitioners for the townsite are you not?

A. Yes sir.

Q. Will you state why it was that the railroad right of way was not platted as a part of this townsite?

Mr. HEITMAN: I object as immaterial and irrelevant.

Overruled. Exception taken.

A. It was generally understood at the time of the plat that the railroad company had a 400 foot right of way.

Q. Then there was no part of it included in the townsite?

Mr. HEITMAN: Objected to as asking for a conclusion of law. This witness is not a lawyer, and it is a question for the court to pass upon.

Objection sustained. Exception taken.

Q. Then there was no part of the railroad right of way included in the townsite?

558 Mr. HEITMAN: One of the points that the Commissioner decided was that these buildings were on the right of way and therefore not on the forty. That was a question of law purely for the consideration of the court, and here counsel is trying to make the witness pass upon the law of the case. I object to the evidence for the further reason that the petition of Mr. Melder in 1895 is the best evidence for what is claimed. Let the record show that we claim the entire northwest quarter.

Objection overruled. Exception taken.

Q. Why was it, that you state that the townsite claim embraces or embraced this whole legal subdivision, including the railroad right of way?

Mr. HEITMAN: He did not say anything about including the right of way. You are putting words into his mouth that he did not say.

A. My understanding is that forty acres is the least legal subdivision that can be taken as a townsite. That was my reason for not including the entire forty acres, and the railroad right of way being

across that, I am not a mathematician enough to segregate that fro
the other and make a claim for the entire forty.

Q. But as a matter of fact you did not in your plat include th
right of way in your townsite claim; is that right?

A. No sir, I would not admit that. It is inside of the platt
ground, this railroad right of way; probably it is not platted a
lotted, etc.; it is used for street purposes.

559 Q. Now, Mr. Whitcomb, in your direct examination,
what price was it in 1895 you valued your residence buildin
south of the railroad?

A. About $500.

Q. Are you certain that that is a fair valuation of that proper
on November 27, 1895?

A. I would think so, yes sir.

Q. And the outbuildings at that time, what did you val
them at?

A. I think at $100; I think that was my valuation.

Q. All of the other outbuildings out together. Now, the re
dence you had on the north side of the right of way known as t
Lloyd building, what did you value that at on November, 1895?

A. I think at $200.

Q. Now the old store, the Whitcomb Brothers & Nagel store, up
November, 1895 what did you value that at in your direct examin
tion?

A. The old store?

Q. Yes, I think it was occupied by Hasselroth.

A. That is the building you are speaking of now?

Q. Yes sir.

A. Yes sir.

Q. That is the one you valued at $200?

A. Yes sir.

Q. The other building I had reference to was the Binton hou
or Lloyd house, what did you value that at?

A. $500. I paid Mr. J. F. Binton $575 for that, a
560 the little house there in cash. I valued the two at $6
my valuation.

Q. What did you value the barn at in 1895?

A. $100, that is the Whitcomb Brothers & Nagel barn. W
you state whether that is the barn I am swearing to. I don't wa
to swear to something I don't know anything about. You don't ma
any answer to my question, so I don't know whether it is or n

Q. The barn in the street?

A. Yes the barn partially in the street.

Q. Now, that McWilliams building, what did you value that
the building that McWilliams was living in?

A. $100; that is my own private property.

Q. Now to the best of your judgment do you think these valu
right?

A. To the best of my judgment they are. I don't think th
is anything out of the way with them. I am a carpenter by tra

and have a pretty good idea about these things, about the construction and purchase, etc., of materials.

Q. Would your judgment now be as good as your judgment would have been in November, 1895, about it?

A. I think so; of course I am getting older all the time but I guess a man improves with age usually.

Q. And you think those are fair valuations?

A. Yes I would think so.

Q. In your testimony given at the prior hearing, on page
561 10 of the record, there is the following question: "State the value of the several buildings on that tract immediately preceding the filing of the plats in the land office, November 27, 1895. Your answer to that question, in fact, reads as follows: "I have a residence valued at about $50 and other buildings to the value of about $50. My residence and outbuildings on the south side of the track, I have in addition to that on the north side of the track one residence worth about $400 and one residence worth about $75. Whitcomb Brothers & Nagel have in addition to the store building, another building worth about $75 and a dwelling worth about $75."

Q. Will you state how you can reconcile those two statements as to the value of those properties?

A. I would like to see that (referring to record).

Q. There is the question and there is part of the answer. (handing same to witness).

A. Well, I would state that the value that I put in here in 1895 are a way below what they should have been. I can't understand how I got those in that shape. I consider that the value that I put on the property today a fair valuation of the property, even at the time you speak of here in 1895.

Q. Then you think your judgment now as to the value of those buildings is better than it was in 1896 when you gave that testimony?

A. I can hardly understand why I put the valuation of those buildings in the way they are here. Some of the buildings
562 are in higher than what they should have been valued and others are rated lower.

Q. I refer you to page 28 of this testimony and ask if that is your signature to that deposition?

A. Yes sir, that is my signature.

Q. Is it not a fact, Mr. Whitcomb, as your counsel stated here yesterday, that [illegible] now believe that the higher the value the stronger would be your chances of success in this contest?

A. No sir, I am not giving my evidence that understanding at all. My evidence as I am giving it is supposed to be the truth as near as I can speak it. I am not working to enhance the value of the property; I don't think any of my acts through life among any of these gentlemen would appear that way.

Q. I will ask you Mr. Whitcomb whether or not you have discouraged any witness whom you expected to testify for John E. White in this contest to come here in this hearing?

Mr. HEITMAN: I object for the reason that it is not proper cross examination; for the further reason that the name of no witness is mentioned, nor the time and place when Mr. Whitcomb attempted to discourage a witness from attending was not mentioned.

Objection sustained. Exception taken.

A. No sir.

Q. I want to know Mr. Whitcomb, whether or not it is not a fact that you told Mr. W. A. Eplin that there was no means to compel him to come here?

A. I did tell him so, yes sir. He asked me the question
563 and I told him that I did not think there was. I did not discourage the man about coming here at all. I have not said a word to him since he came about his coming or anything else, I have not mentioned the matter; he is his own free agent, can go where he likes. He asked me that question and I answered it.

Q. Is it not a fact that you asked his brother to go to Missoula to consult a lawyer to see whether or not he could be compelled to come here?

A. No sir, it is not a fact; his brother will bear me out in the assertion.

Thereupon a recess was taken until 1 o'clock p. m., at which time the hearing was resumed with the same parties present as before, and the cross examination of the witness on the stand, M. P. WHITCOMB was resumed, as follows:

Q. Now, Mr. Whitcomb there has been some reference made to a house there—I think it is the old Houston house belonging to you and to Mr. Hutton: that is since the improvement of the place there will you please state whether or not you own the building as improved jointly, or do you own separately the improvements that have been placed there, or did you in 1897?

A. No sir. I only own the old part, the original part.

Q. You owned the — part and he owned the new?

A. He did at that time.

Q. Do you remember when Mr. Hutton came to Clark's Fork?

564 A. I think the summer or spring of 1896.

A. I think so.

Q. And this addition was placed there when?

A. I think the same summer, if I remember; I have no record of it, I don't know.

Q. Now, there has been some mention made what is called a root cellar, built some time after October 16th, 1896. Was that constructed by Whitcomb Brothers & Nagle?

A. Yes sir.

Q. About when was it constructed?

A. I think the fall of 1896, if I remember; I think it was that time.

Q. Do you remember having been served one night by Mr. White with written notice not to build this root cellar?

A. Yes sir.

Q. You remember that?

A. Yes sir.

Q. Have you the original of that notice?

A. I have not, sir.

Q. I show you a letter press copy or what purports to be a letter press copy of this original in the record attached to one of the affidavits of Mr. White, filed in the Land Department about December, 1900, which reads as follows: To Messrs. Whitcomb Brothers & Nagel, Clarks Fork, Idaho: You are notified not to build or otherwise trespass upon the land that has been adjud-cated to me as a homestead by the U. S. Land Office at Cœur d'Alene; and
565 you are further notiffied that if you persist in doing so that I shall by process of law enjoin you from moving any improvements that you place upon the same, and shall hold them as personal property. Respectfully, (signed) John E. White. Dated October 16th, 1896", and pencil notation there, "Notice served same day. C. I. White, witness, also by George Roberts, mailed to each J. B. Whitcomb and John G. Nagel; he read notice" and some other word that I cannot make out.

Mr. HEITMAN: The pencil memorandum has nothing to do with it. Do you want him to identify that?

Q. The part in ink, is that a correct copy of the original?

A. I would say it was the same, substantially, of the notice I don't know that that is the correct wording, I would not swear to that.

Q. Mr. Whitcomb, can you give us the width of the front part of the body of the present Whitcomb and Nagel store, as it existed November 29th, 1897, and November 27th, 1895?

A. The store building is a building 24x50, the main part, standing 6 feet in on the lot from the street sideways, making it equal to 30 feet in width, 30 feet from the outer side of the lot; the lots are 35 feet wide.

Q. You say it is 6 feet in on the lot from the street?

A. It is 6 feet in on the corner here to the edge of the building, and 24 feet wide.

Q. Making 30 feet in width?

566 A. Making 30 feet in width with the side walk.

Q. Then you are in error in saying that any of that store building extends over into lot 2 of block 10 are you not?

A. No sir; we have a room built on toward the back end. The side lapping out onto lot 2; the building is I think 14 feet wide.

Q. How far does that extend?

A. Either 12 or 14 feet wide; the building extends out to lot 2 near the end of the store building.

Q. How far does it extend?

A. Either 12 or 14 feet wide; I think 14 feet wide.

Q. Mr. Whitcomb, will you swear positively that the eastern edge of that building is 6 feet west of the eastern line of lot 1?

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A. It is in the neighborhood of that; I don't remember whether the walk is 6 or a little bit less, but I am pretty positive the walk is 6 feet wide, the walk in along side of the street.

Q. Is not the walk on the street?

A. No sir it is not.

Q. What is the width of the street there?

A. I think they are 60 feet. (referring to the diagram) This is 60 feet and this is 60 feet.

Q. You mean to say you have a walk placed on lot 1 there?

A. Yes sir; the corner stake of the lot stands out in the street about 6 feet from the building; it is a buried stake driven down and it can be dug up at any time.

567 Q. Now Mr. Whitcomb, in an affidavit of July 6th, 1899, you filed in the interior department, you used these words, "In behalf of the above Henry Melder, who has applied to make townsite entry on the northwest quarter of the northwest quarter of section 2, township 55 range 2 in the Coeur d'Alene, Idaho district" you proceed to make a request for a supplemental hearing. What authority did you then receive from Mr. Henry Melder, and under what authority did you make that statement?

Mr. HEITMAN: I object; it is utterly incompetent; not directed to any issue.

Mr. LAMAR: It is the petition on which this hearing was ordered, purports to act as the representative of the Probate Judge. Now we want to know what authority he had from the Probate Judge to make such an application; it is among the affidavits in the record here.

The REGISTER and RECEIVER: Does not the record of the case show what authority he had?

Mr. LAMAR: No sir, gives no other authority; that is it alleges that.

Objection sustained.

Mr. LAMAR: I do not understand that your ruling is anything more than that it was irrelevant but that you would be willing to have it taken down. We will acquiesce on any ruling that you may make.

The REGISTER and RECEIVER: I did not intend to exclude it. I want to give him the privilege of answering it if he wants to.

568 Mr. HEITMAN: Unless the rule has been abrogated there is a rule that provides that obviously irrelevant questions will be put a stop to. The records of the hearing before the department shows that one of the points made by the contestee before the department was that Judge Melder had long since ceased to be Probate Judge, and that no authority existed for prosecuting this contest further. Now my answer I think, if your Honor pleases is this: That the Probate Judge does not prosecute this as an individual or as a person; it is prosecuted by Henry Melder as a Judge; the contest was initiated by him in his capacity as probate judge; that authority was conferred upon him by the State statute and an Act of Congress; it was a duty imposed upon him; no discretion whatever did he have

in the matter upon a petition being presented to him as required by law, as was done in this case, it was his duty to initiate this contest. When he retired from office that duty passed with his office to his successor, and I don't care whether this proceeding is in the name of Henry Melder as probate judge or whether it is in the name of Edwin McBee as probate judge; the prosecution is conducted by the probate judge in his official capacity the individual that fills the office may change or he may die, but the office itself never dies; the position of Probate Judge is always in existence, and the duty imposed by law upon one incumbent of this office passes by the act and operation of law to his successor, and it is utterly immaterial whether it was prosecuted in the name of Henry Melder or in the
569 name of Edwin McBee, his successor or J. B. Brady his subsequent successor or the name of Edwin McBee, the present incumbent of that office; it is the Probate Judge as an officer, and not as the individual incumbent of that office who prosecutes the proceeding, and this point was raised and was evidently ignored by the Department. You will see if your Honor please, in these proceedings that is one of the points made.

Mr. LAMAR: I concede the point to have been raised. Henry Melder has long since ceased to be Probate Judge, and no authority has been shown for the prosecution of the application for rehearing; second, that no abuse of the Commissioner's discretion in refusing to order a hearing has been shown; third, that the case has become *res adjudicata*. The Department evidently ignored the point about Henry Melder because it went on and has ordered a rehearing, so I submit a list of questions tending to bring out the evidence as to whether he was authorized by Henry Melder to go on with this contest, under this rule, obviously irrelevant questioning, and therefore it is the duty of the register and receiver under this rule to summarily put a stop to such questions, as being obviously irrelevant questioning.

Mr. LAMAR: Counsel concedes that the register and receiver under this order of reference can exclude any testimony which in their judgment does not come within the scope of the inqu-ry. Counsel admit that the question as to Judge Melder being probate
570 judge at the time was suggested on a record above, although there was no proof there to the effect that he was not probate judge, if counsel remembers correctly, but we submit that this affidavit constitutes the affidavit on which the hearing itself is ordered. While the department does not extend the scope to everything contained in the affidavits, this is the affidavit on which the department has ordered this hearing. It was charged above that this application for a rehearing was not made in good faith, but for the purpose of delay. The Honorable Commissioner was impressed with that idea and refused to order this hearing. It went to the Department, however, and the Department saw fit to refer this matter back and give these people an opportunity to submit proof within certain narrow limits. Now the king bee of these protestants is on the stand. The question as to whether or not his testimony is credible or not credible is a very important matter. Here is in

the record in this case referred out here for the use of the register and receiver and the special agent in making this inquiry, an affidavit in which this witness states as a fact that he requested this hearing under authority of Henry Melder in 1899, and his counsel admit that Henry Melder was not probate judge at that time. Now I say that the introduction of the answer to this question by this witness based upon an allegation in his affidavit of contest should certainly be allowed to show whether this witness is credible or not, a statement under oath and referred here by the De-
571 partment to the register and receiver in order to utilize in seeing whether these people are telling him the truth or not.

Mr. HEITMAN: I just admit this, if your Honor please, is there an issue submitted here to your Honor upon which you are required to confine the taking of evidence which authorizes you to receive evidence as to who was probate judge in 1899 or who has ever been probate judge.

Mr. LAMAR: Do you allow this answer to be made?

Mr. HEITMAN: I make the motion that the register and receiver summarily put a stop to this line of questioning, as being obviously irrelevant questioning under rule 41 of practice.

Motion sustained. Exception taken.

Q. Now, Mr. Whitcomb, this board fence that you speak of it as being in the rear of the old Roberts building, does it not extend back on to the Nagel homestead and include a part thereof?

A. I think it did in 1895, also in 1897.

Q. Were not a number of fruit trees in that part of the yard or enclosure?

A. I think there are two or three fruit trees on that portion of the land, I couldn't say just how many; there might not be over two or three.

Q. There is a pig pen on that part of the land too is there not?

A. I don't know, I think there has been at one time; there was a barn on there at one time, but that has been torn down.

572 Q. Mr. Whitcomb, in 1896, at that former hearing, before the Roberts' residence building had been burned down, when it was there for you to see, whether it extended back off the right of way or not, did you state in your former testimony that any part of that building extended off of the right of way?

Mr. HEITMAN: Let him look at his evidence and refresh his memory.

A. I don't remember whether I did or not; I hardly think I did state so from the fact that we did not consider it was vitally important, from the simple fact that there was a town on this ground, we considered that sufficient.

Q. Did you not say in your cross examination before today that the right of way was not platted because it was not considered to be a part of the land, at the prior hearing?

A. I don't remember whether I stated that fact or not, whether I made that assertion.

Q. It is a fact, that you look at the plat, that you did not plat as a part of the town?
A. It is not platted.
Q. Read the testimony there and see if you did not?

Mr. HEITMAN: If he stated it once object to his being required repeat it.

Q. When did you discover that this house extended over the right way?

A. I think I knew it at that time, and undoubtedly could not help but knowing, because our building fronted right up

Q. What was the length of that house north and south, Roberts house?

A. I will say somewhere from 20 to 24 feet, I don't remember.
Q. Twenty feet?
A. Twenty to 24; I don't know.
Q. Mr. Whitcomb, I show you contestant's exhibit "A" introduced evidence at a prior hearing, consisting of a blue print, showing building there. Will you see whether it will refresh your mem- as to whether that house extended over the right of way?
A. This is not a correct print.

By Mr. GRAHAM:

Q. Was it correct at the time?
A. No sir, it was not at that time correct.
By Mr. LAMAR (resuming): Was it disputed at the prior hear-?
A. I don't know about that, but it is not correct. The buildings not laid out as they were as to position, as they are on this print.
Q. Is there any change in the Roberts building?
A. (Referring to print). This is the Roberts building.
Q. Yes.
A. The hotel came out considerably beyond the saloon building.
Q. How much beyond it?
A. Well, far enough so that they had a bath house and other buildings in behind.

Q. How many feet about?

A. It would be pretty hard to say; I should say sixteen wenty feet, something.
Q. Sixteen to twenty feet?
A. Yes sir, something like that.
Q. Sixteen to twenty feet?
A. Yes sir something; like that.
Q. Is not one of those buildings sixteen to twenty feet beyond the er one?
A. Out back this way (illustrating)?
Q. (Illustrating). Is not this 16 to 20 feet in the rear of this one?
A. That is the old store building; that is something near right, this does not show any building behind here at all.
Q. What is the extreme length of the residence building proper, including the hotel?

A. Of the Roberts building?

A. Yes.

A. I could not say; I never measured them, they were quite lengthy, I don't know what the length might be.

Q. Then at this late day after this building is burned down, you are willing to put your memory as to this building extending over the right of way against all of the documentary evidence to the contrary and against any testimony which was introduced at the former hearing on that point?

A. Yes sir; I am quite certain that this building extended
575 over; in fact, I know that the building extended over onto the townsite.

Q. You are as certain that extended over as you are that your estimate of values is better seven years after the improvements were placed there than they were at the time of the improvements? (No answer.)

Mr. HEITMAN: This applies to the Roberts building, I understand, not to the store or building.

Mr. LAMAR: I wanted to get the strength of the convictions of the witness.

Q. Now, Mr. Whitcomb, about these lots which you say had been fenced prior to November 29th, 1897, enclosing lots then claimed by John G. Whitcomb, being lots 11, 12, 13, 14 and 15 in block 4. In refreshing your memory in connection with this matter let me ask you if you do not recall the fact that a Fourth of July picnic was held in 1897 on the premises represented by these lots on that day?

A. I remember of a picnic being held there, but am quite positive the picnic was held the year before in 1896; some of the old poles and sticks are still there, and a pile of wood near the house. I am positive of the picnic being held there.

Q. How soon after the picnic was held there was it that these lots were fenced?

A. I am not positive as to the year of the picnic. If the picnic was in 1896, as I think it was, the lots were enclosed the next spring in time to put garden into them.

Q. Which would have been in 1897.

576 A. The spring of 1897.

Q. But if the picnic was held there in July, 1897, then the lots were not enclosed until the spring of 1898, is that right?

A. My recollection of the matter at that time is that the picnic was there when the lots were not enclosed with a fence.

Q. And that the lots were enclosed the next spring after the picnic was held there?

A. Yes sir; the lots were enclosed the next spring after the picnic was held there.

Q. Now, Mr. Whitcomb, in your testimony, you stated all of the buildings that were on this land off of the right of way November 29th, 1897, have you?

A. To the best of my recollection, I have.

Q. Mr. Whitcomb, in an affidavit in the record made by you Sep-

nber 25th, 1899, there occurs the following: M. P. Whitcomb eing duly sworn, deposes and says: That on Sept. 14th, 1899, he d a talk with W. A. Eplin in Whitcomb Brothers' store in Clarks rk about a certain affidavit John E. White had written out in re- rd to Clarks Fork townsite and that he (Eplin) had signed, and . A. Eplin did tell him in the presence of R. Johnson and John oyd that he did not know the contents of said affidavit and that he d never read it himself nor did Mr. White read it to him; that he on request of Mr. White merely attached his signature at the place dicated. Signed, M. P. Whitcomb." Now what if any explana- n are you prepared to give of that statement under oath?

Mr. HEITMAN: I object as improper cross examination.

Objection sustained. Exception taken.

Mr. LAMAR: I ask for the answer.

A. I understood that Mr. Eplin had made this affidavit; I do not member who told me so. I asked him about the affidavit and that s the explanation he gave me, that he did not know the contents the affidavit that he had signed; that he merely affixed his name the indicated place. That might not have been just exactly the rds that he used but that is the substance of it.

Q. Who was it told you about this affidavit?

A. I don't remember who; I don't remember how I got the in- rmation.

Q. What did you understand it related to?

A. Something in relation to the townsite; he did not seem to know at it related to; I don't know what it related to.

Q. Why did you make that affidavit.

A. Simply because he told me that he had put his name to this davit in that shape.

Q. And you desired to discredit his testimony before the Depart- nt?

A. Yes sir; a man that would make that kind of a statement.

Q. In the same way you desired to prevent receiving his testi- ny at this hearing?

A. I did not attempt to do that sir.

Q. You admitted this morning that you told him that he did not have to come here did you not?

A. Yes sir I told all of my witnesses the same thing. You can't l any of them that I did not tell the same that there was no law compel them to attend this hearing. I did not mean my wit- ses I misspoke myself then; I meant the witnesses for the town- .

Q. You told everybody that?

A. Yes sir.

Q. You desired it generally understood in Clarks Fork that no- ly need come to Cœur d'Alene unless they desired to.

Mr. HEITMAN: I object as wholly immaterial.

Q. Is it not a fact Mr. Whitcomb that you or your firm are ad- ncing all of the expense in connection with this contest?

Q. And he resided on the right of way in the section house?
A. I think I included Mr. Eplin's father; in my estimate I think I did.
Q. Mr. Eplin resided in the section house along the railroad?
A. In the section house on the right of way.

Q. Witness excused.

GORDON DAUGHARTY called as a witness on behalf of contestant and being first duly sworn testified as follows:

Direct examination.

By Mr. HEITMAN:

Q. State your name residence and occupation
A. G. Daugharty; Clarks Fork Idaho; Kootenai county; hotel and saloon keeper. Do you want my age.
583 Q. Yes.
A. Born in 1857.
Q. How long have you resided at Clarks Fork?
A. I have resided there since the fall of 1888 I think to the best of my knowledge.
Q. Are you acquainted with the land in controversy in this case?
A. Yes sir.
Q. Do you of your own knowledge know the value of the building and other improvements that were on this land in November 1895?
A. I could give a good fair estimate of it, set a valuation on it.
Q. Well set it.

Mr. LAMAR: I object to the testimony on the ground the proper foundation has not been laid.
Nothing has been shown as to Mr. Daugharty being an expert on values.
Objection overruled. Exception taken.

A. Well, I would estimate the town improvements, buildings, as worth at that time from fifteen to twenty thousand dollars cash.

Mr. LAMAR: At what time?
Mr. HEITMAN: November, 1895.

Q. Do you know the value of the buildings and improvements on the land in controversy in November, 1897?
A. I would not say that I knew them all, but what I do know, I came here to estimate a portion of the town but not all; I have been living there, but I am not acquainted with the most
584 of the houses. I know where they all are, but I am not acquainted with this townsite and could not place them.
Q. Can you give an estimate of the value of these improvements in 1897?

Mr. LAMAR: We object to the question because the witness has admitted that he does not know the locations of the townsite claim.

move that his answer, in which he says that the improvements ere valued at fifteen to twenty thousand dollars be stricken out as ot founded on sufficient knowledge.

The REGISTER and RECEIVER: Strike out the answer in which e witness states the value as fifteen to twenty thousand dollars. hat is merely an estimate, is it not?

Mr. HEITMAN: Yes sir. I will go into it in detail, then.

Q. Do you know what the value of the store building of Whitmb Bros. & Nagel was in November, 1895? That was on the wnsite; there is no dispute about that.

A. The store building and the store as it stood there, about $2500.

Q. What was its value in November, 1897?

A. About the same.

Q. Did you know the value, in November, 1895, of the building cupied by Butler Brothers as a saloon and hotel?

A. I would judge it was about $900 to $1200.

Q. Did you know its value in November, 1897?

A. From about $1500 to $2000.

Q. Did you know the value of the frame building used a dwelling by Joe Butler and family in November, 1895?

A. Yes.

Q. State it.

A. About $250.

Q. What was its value in November, 1897?

A. I put its valuation in on the Butler building after it was ned: it was joined in 1897.

Q. Did you know the value, in November, 1895, of the building d as a dwelling by Jason Edwards?

A. As a dwelling by Jason Edwards? Where was that situated that time?

Q. On lots 1 and 2 in block 9 of that townsite?

A. That was worth in the neighborhood of about $350 to $400.

By Mr. LAMAR: In 1895?

A. No, in 1895, I would say I am positive; it was there in 1895.

By Mr. HEITMAN (resuming):

Q. Well, if it was there what was its value?

Objected to. Objection sustained.

Q. Do you know the value of the Jason Edwards building ever ce it has been put there?

A. I should say it was worth about $350 to $400. I know where building was, but I would not say positively it was there, in 5.

Q. What was it worth in November, 1897?

A. $350 to $400.

Q. Do you know the value of the frame building which was owned by Butler Brothers on lot 9 used as a laundry and sidence in November, 1895?

A. I know of the building, but I never seen the back part of it,

honestly I never seen it, and so I would not put any value on it, because I don't know what it was worth.

Q. Do you know the value in November, 1895, of the building used by Tom March and Reuben Johnson as a dwelling?

Mr. LAMAR: We object. It assumes as true a disputed question of fact, as to whether it was used by Reuben Johnson as well as Tom March.

Objection overruled. Exception taken.

A. I know where the building is.

Mr. LAMAR: He has already stated in his last answer that building being alleged on block 8, lot 9, he would not put a valuation on it.

Mr. HEITMAN: No, it was a laundry he was talking about.

Q. No, what was the value in 1895, if you know?

Mr. LAMAR: Will you state what that paper is that you are reading from there? I call on the local officers.

By the REGISTER and RECEIVER:

Q. What is tha- paper you have in your hand that you are referring to?

By Mr. HEITMAN:

Q. What is that?

A. That is nothing but a list of mine.

587 Q. You can keep it if you wrote it out. State what it is.

A. It is a paper, a list of not much account, my own affairs, own buildings.

By Mr. LAMAR:

Q. Where did you get it from?

A. There is nothing at all that I have used it at all.

Q. Where did you get it from?

Mr. HEITMAN: That is nobody's business but his own.

Mr. LAMAR: We object to his looking at any paper to refresh his memory without stating what the paper is.

The WITNESS: I will look at any paper I have got that is a private paper; it is simply building contracts and mortgages and stuff that I had of some kind.

Mr. LAMAR: That paper that you had in your hand is not the paper you had in your hand a while ago.

The REGISTER and RECEIVER: (To the witness) Don't take any more papers out of your pocket, unless you are willing to refer to them and state what they are, during this testimony.

Mr. LAMAR: We note an objection to the witness answering the question asked prior to the time when he looked at that paper, when he states he will not say what those papers are, the two little papers that are in h-s coat pocket.

By Mr. HEITMAN (resuming):

588 Question read as follows: Now what was its value in November, 1895, if you know.

A. $250.

Mr. LAMAR: We renew the objection to this witness proceeding to testify in response to a question heretofore propounded and after the propounding of the question examining a paper, until this witness produces that paper and explains what it is, which paper he has consulted since the point was raised.

Objection sustained. Exception taken.

Mr. LAMAR: The objection was sustained. Let him produce that paper he has not produced the paper.

The REGISTER and RECEIVER: I did not exclude the evidence. I sustain the objection, to go on record.

Q. What was the value of the building in November, 1897?

A. About the same.

Mr. LAMAR: He said before that the building on block 8, lot 9, which Mr. Heitman called a laundry, that he did not know its value, as he had never examined it.

Q. Do you know the value of the building in November, 1895, which was used as a dwelling and which was owned by Whitcomb Brothers & Nagel. Now I want to get this location right. I have it from Nagel's evidence. It was located partly on lot 10, block 9, partly in the street dividing blocks 9 and 5. Did you know that building?

A. About $250.0

Q. What was its value in November, 1897?

589 A. About the same.

Q. Did you know the value in November, 1895, of the building belonging to Whitcomb Brothers & Nagel, used as a barn, that is in the street dividing blocks 9 and 5?

A. About $50.

Q. What was its value in November, 1897?

A. About $150.

Q. What was the value in 1895 of the building owned by Mrs. Lloyd as a dwelling located in the street and used as a dwelling dividing blocks 10 and 6?

A. About $600.

Q. What was its value in November, 1897?

A. Just about the same.

Q. Did you know the value in November, 1895, of the building known as the Houston building, that was in the street dividing blocks 10 and 6?

A. In 1895, it was worth about $50.

Q. What was its value in November, 1897.

A. About $150.

Q. Did you know the value in November 1895 of the building known as the post office used by Mrs. Thibadeau and daughters as a dwelling?

A. I should judge about $100.

Q. What was it worth in November, 1897?
A. About $100.
—. Did you know the value, in November, 1895, of M. P. Whitcomb's dwelling?
A. About $500.
Q. Did you know its value in November, 1897?
590 A. About the same.
Q. Did you know the value of M. P. Whitcomb's other improvements, including other improvements around his residence, out buildings, fences and orchard, and everything of that kind, in November, 1895?
A. About $300.
Q. Do you know the value of these improvements in November, 1897?
A. About the same.
Q. Did you know the value, in November, 1897, of Charles Schindler's house?
A. It was worth about $200, I should judge.
Q. Did you know the value, in November, 1897, of the cellar built by Whitcomb Brothers & Nagel, root cellar, I believe it is called?
A. About the same.
Q. Did you know the value, in November, 1897, of the dwelling house of Walter Fleming?
A. That is about $200.
Q. Do you know whether or not Mr. Fleming made any other improvements in connection with his house?
A. I am positive he put an addition on the back end.

Mr. LAMAR: We ask to have that stricken out if it was made subsequent to 1897.
Mr. HEITMAN: I withdraw the question.
The answer is stricken out.

Q. I don't mean any addition to the house. Were there
591 any other improvements on these lots or around this house by Mr. Fleming prior to November, 1897?
A. Not to my knowledge.
Q. Did you know the value in 1895 of the buildings used, owned and occupied by George Roberts as a saloon and hotel and store building?

Mr. LAMAR: We ask that in answering this question he state what was on the right of way and what was off.

A. About $2200.

Mr. HEITMAN: It is admitted that at that time these identical buildings were on the right of way. We have admitted that I don't know how many times.

Q. Do you know the value of the residence of George Roberts back of these buildings in November, 1895?
A. About $150.

Q. Do you know the value of any other improvements that George Roberts had in November, 1895, on the land in controversy?
A. He had a stable worth probably about $25.
Q. Anything else?
A. A small pig pen?
Q. What was the value of the pig pen?
A. About $10.
Q. Did he have any other improvements?
A. A water closet.
Q. And the value?
A. About 75 dollars; it was a good closet.
Q Did Roberts have any other improvements on this land?

592 Mr. LAMAR: We object as leading and suggestive?

A. He had an orchard, fruit trees, etc., gooseberries, just fruit, different varieties.
Q. What was its value in November, 1895?
A. About $50.
Q. Did you know the value of all these buildings and improvements you have mentioned as belonging to George Roberts in November, 1897?

Mr. LAMAR: We object to the question because it assumes that all of these buildings were owned by George Roberts in November, 1897?
Mr. HEITMAN: November, 1897, is intended to refer to the valuation at that time.
The REGISTER and RECEIVER: You can modify it by saying which belonged to George Roberts in 1895, what was their valuation in 1895.
Mr. HEITMAN: That is what I mean.

A. $2500 all told.
Q. State whether or not these buildings and other improvements which belonged to Roberts in November, 1895, changed hands between November, 1895, and November, 1897?
A. They changed hands on the 15th or the 5th of April, 1897, along there.
Q. What did Roberts do with them on the 5th of April, 1897?
A. Turned them over to me.
Q. State whether or not you bought them.
A. I bought them.
Q. How much did you pay for them?
593 A. $3000.
Q. What did you buy from Roberts which was included in this sale for which you paid $3000.

Mr. LAMAR: We ask whether or not the bill of sale was in writing, and ask that the bill of sale be produced as a foundation of the matter about which he is inquiring.
Objection sustained. Exception taken.

Q. Was that sale in writing?
A. It is here. I don't think I got the first cash payment. I will

run over and see. (Examining) I paid so much down and so much a month.

By Mr. GRAHAM:

Q. Roberts hadn't it?

A. No sir. (Producing.) The other can be got, it is at home.

By Mr. HEITMAN (resuming): Did you get a bill of sale in writing for the property?

A. I have that at home, if it aint been destroyed since the fire.

Mr. LAMAR: I think that ought to be stricken out. The register and receiver ruled that he could not proceed with this line of testimony in what is done in the written instrument until the written instrument was produced, and while looking up the instrument, he puts that on record.

The REGISTER and RECEIVER: If the written inst- cannot be produced parole evidence can be admitted.

Mr. LAMAR: We call for the production of the paper or proof of its actual destruction.

594 Mr. HEITMAN: I will state this. My understanding of this rule is that, whatever the title to property is actually in controversy and there is a written instrument affecting that title, that then the written instrument has to be shown, but the rule certainly is not where the title to property is to be shown collaterally, as it is here. Those people cannot deny but that he is the owner of those buildings; at any event the title to these buildings; at any event the title to these buildings is not in controversy.

I desire to show by this witness the value of these buildings as a part of the improvements on this land in controversy, and as a part of that proof, I desire to show the price he paid for the improvements he bought from George Roberts. Furthermore, if the court please, the title to personal property—and this was personal property, because it was merely buildings situated on land the title to which was in the United States government, or in the railroad company, as the case may be, and therefore they were personal property, and it does not require a written instrument to pass title to personal property, which passes by delivery, and it is good between the parties without delivery, and this proof was simply for the purpose of showing the value of these buildings and these improvements, and one of the best tests of the value is what the property brought in the market at or about the time at which the value is desired to be fixed.

Mr. LAMAR: Under the statutes of this state a bill of sale
595 can be acknowledged and recorded. We are averse to these written instruments being introduced. We would prefer that they would be produced, but we do object, while those instruments are in existence, and they are the best evidence as to what they convey to have the witness proceed here to state what the legal effect of those instruments was. There has been produced here and now is in the hands of opposing counsel a mortgage, which is evidently the first step in this chain in the transmutation of this title, and we ask that that be first produced, and then that proper foundation

be laid for the giving of the contents of the other written instrument, the loss of which has not been shown. We are as anxious as opposing counsel is to get the facts of this transaction, but we do desire the written instruments to be of record instead of first giving the contents of this instruments, when the instruments can be had.

Mr. HEITMAN: I will offer in evidence, as an exhibit in this case——

Mr. LAMAR: After you identify the signature.

Q. (Handing witness paper). State what that paper is.

A. This is a mortgage which I gave George Roberts for the balance of the payments, stating that at such time I was to pay such money, five hundred at such time, paid him so much down and the balance after.

Q. Who signed that mortgage?

A. That is my handwriting.

596 Mr. HEITMAN: I offer that mortgage in evidence, the contents describes this very property, what it is and where it is situated.

Mr. GRAHAM: We object to the introduction of this instrument, first for the reason that it does not show that it was ever delivered to or accepted by George Roberts; second, its execution is defective, in this, it is not properly acknowledged filed for record in accordance with our statutes; and, fourth, it has never been paid or released, and its possession of it by the witness is unaccounted for. The further objection it does not tend to prove any of the issues of the case.

The REGISTER and RECEIVER: If he can offer any explanation he may do so.

Q. For what was this mortgage given?

A. It was given to George Roberts to hold the building, merchandise and stuff until I paid the dues.

Q. What dues?

A. $500 at each term, and I raised those papers before the term and the time expired. The papers were delivered to John E. White and I delivered him the money and he delivered me a bill of sale and the papers.

Mr. GRAHAM: We move that the answer be stricken out for the reason that the witness testifies that the mortgage was given as security for the payment of merchandise, and there is no merchandise of any description mentioned in the mortgage.

The WITNESS: Buildings and merchandise I said.

597 The REGISTER and RECEIVER: I rule that it shall not be admitted as evidence in the case. It is not obviously irrelevant and therefore it will not be excluded. It is admitted but over my ruling, the same as before.

Exception taken.

The paper is marked Contestant's Exhibit A in the supplemental hearing.

Q. State whether or not at the time you bought these buildings and other improvements from George Roberts, on April 5, 1897,

you had any conversation with John E. White, the contestee in this case?

A. Not that I remember.

Mr. LAMAR: We object. None of the issues in this case are involved. We object to the giving of any evidence as to a conversation with John E. White in response to the question, because it does not involve any of the issues in this controversy.

Objection overruled. Exception taken.

Q. What was the answer?

A. None to the best of my knowledge.

Q. State whether or not at any time subsequent to April 5, 1897, and prior to November 29, 1897, you had any conversation with John E. White relative to your having bought this property?

Mr. LAMAR: We object to that question because of the fact that this is personal property and was located on the right of way and not the land in controversy, and indefinite both as to time and place.

Mr. HEITMAN: State that he offers this under the fifth
598 issue and state that he proposes to show by this witness that prior to November 29, 1897, White did acquiesce in the purchase by this witness of the Roberts property, and his occupancy thereof.

Mr. LAMAR: Counsel calls attention to the statement of a record by opposing counsel with regard to *the statement of a record by opposing counsel with regard to* this very transaction, to the effect that it was a collateral issue and was not involved in the direct issue in the case.

Objection overruled. Exception taken.

Q. (Question read.)

Mr. LAMAR: I want to renew my general objection set forth at the beginning of the hearing.

The REGISTER and RECEIVER: I make no rule on that, because I made the ruling in the first place.

Mr. LAMAR: You overruled it in the first place?

The REGISTER and RECEIVER: Yes sir.

A. Well, we met at the depot.

Q. When was this, what date, fix the date and the place.

A. It was along between the 5th of April and the 20th of April, I said between April 5th and the 20th, 1897.

Q. Between the 5th and the 20th of April, 1897. Now go on.

Mr. LAMAR: I object to the introduction of this testimony on the same grounds as stated in the general objection set forth in
599 the beginning, as well as the objection heretofore made in connection with this.

A. (continued.) Shook hands with me and congratulated me, said he was glad I had bought the place and hoped that him and I would get along in future just as nicely as him and George had, that he would continue his business the same with me as he did with George Roberts.

Q. Where was this conversation?
A. In front of the depot.
Q. Where?
A. Clarks Fork.
Q. What county and state?
A. Kooteani County, Idaho.

Cross-examination.

By Mr. LAMAR:

Q. This was after your transaction with Roberts had been closed at this conversation took place?
A. Yes sir.
Q. This house of Roberts at this time was all furnished with bedding was it not, and the saloon had its furniture in and all of its furnishings?
A. Yes sir.
Q. And this carried with it the good will of the business and everything?
A. Yes sir.
Q. And the store was on the railroad right of way?
A. Yes sir.
Q. The pig pen you referred to, was it on the part of the enclosure extending over the Nagel's homestead, was it not?
A. Well, now, I have always claimed that ground.
Mr. GRAHAM: Answer our question.
Q. It was on the part of the enclosure which extends over on to Nagel's was it not, where the pig pen was?
A. Yes sir.
Q. Mr. Daugharty, an affidavit we find filed for record here purporting to have been sworn to by you, in the presence of Mrs. Thideau, in October, 1899, reads as follows: State of Idaho, County of Kootenai, *ss:* Gordon Daugharty, being first duly sworn, says: that he has been a resident of Clarks Fork, Idaho, for a number of years, and that in April he purchased of George Roberts his hotel and saloon and general merchandise business and building in said Clarks Fork, but that at no time during his deal with said George Roberts or before or afterwards was any hint or mention made by Roberts of any contract he (Roberts) had with John E. White relative to any agreement or promise the said White had made him (Roberts) respecting any portion of the homestead claim of White: that his deal with Roberts was for cash only, and a clear understanding that the land the buildings were situated on belonged to the Northern Pacific Railway company, for which George Roberts held a lease and transferred to him. Signed, G. Daugharty." Did you make this affidavit?
A. That is all right, I remember that.
Q. Now in making your estimate of the values of the lands here—I mean the improvements in Clarks Fork in 1895—you said they were from fifteen to twenty thousand dollars. When you specified those improvements, added up as you have given them, they

show $8175. Now, was your general estimate of $15,000 to $20,000 right, or were your more specific estimate of $8,175 right?

A. Well, there was houses there that are on there that I have not got in, that I did not estimate. There is my barn, that I built in 1897 on there that I did not estimate, and improvements; there are lots of improvements there that I would not think of trying to remember.

Q. What was your barn worth?

A. About $100.

Q. Well, that hundred dollars don't account for this $7,000 difference of the other. Name any that you neglected to mention as being there in 1895. That barn was not built in 1897, was it?

A. 1897; that is what I said.

Q. We are speaking about 1895.

A. Oh, 1895?

Q. Yes. Now name any improvements that were not mentioned by you as being there in 1895 and estimated on, that were there in 1895.

A. Well, I never went around and estimated this place; that is what I set the town's value or basis on, and I know that
602 $25,000 would not touch it at that time, if a man could replace it where it belonged. I told you at the time I could not.

Q. Why did you make this detailed statement, then?

A. I told you I could not replace these town lots, for I was in business; I know where these houses are situated, but I have never looked them over.

Q. Do you mean to say that your estimate of $15,000 to $20,000 is more correct as to the value of these improvements than that brought out by the attorney for the other side, who has pointed out all of the buildings and given you an opportunity to estimate on them, and you have estimated on them?

A. I estimate it as near as I could estimate them as you went over them.

Q. Which is correct, your detailed estimate or your general estimate?

A. I don't know.

Q. You don't know?

A. I am satisfied I went away under the estimate.

Q. You are satisfied you went away under the estimate are you? Name one of them you went under. Which one of them did you go under?

A. I don't know.

Q. You don't know do you? You are a saloon keeper are you not?

A. Yes sir.

Q. Your patronage all comes from those people that live there does it not, largely?

A. Yes sir.

603 Q. You are friendly to the larger part of them are you not?

A. Yes sir.

Q. Came down here to stick up for the people where the biggest number of them are, do you?

Objected to as incompetent, irrelevent, and immaterial cross examination.

Objection sustained.

Q. I want to know what that paper was that you took out of your pocket when you were testifying?

Mr. HEITMAN: I object. He stated that it was his private paper. He has not referred to it once in giving his testimony.

Mr. LAMAR: He referred to it before he answered one of the questions.

Mr. HEITMAN: I don't think he referred to it at all in refreshing his recollection. I object to prying into his affairs. No court or attorney has a right to it, and no court should allow it.

Objection sustained. Exception taken.

Mr. LAMAR: The question is made on this ground: The witness rendered testimony here after inspecting a paper as a memorandum in his possession.

Mr. HEITMAN: I deny that he inspected it while giving his evidence.

Mr. LAMAR: As he was looking at it; his attitude immediately after it was mentioned and putting it in his coat pocket and taking out of his other pocket a paper he had and not letting those papers come out of sight indicate that this witness had and before he 04 gave his answer to one of those questions something by which to refresh his memory, and that his answer was made upon that he saw in that instrument.

The REGISTER and RECEIVER: Specify what question.

The question referred to by Mr. Lamar was read.

Mr. HEITMAN: There is no proof that the witness was reading from that paper when he gave his testimony, and I have never seen such an inquisitorial proceeding attempted in any court. I am going to defend this witness. He stated that it had nothing to do with the case. An attorney has no right to get up here and insert into the record that witnesses are using a paper in connection with his case, which he has refused to produce.

Mr. LAMAR: This witness never stated that it had nothing to do with the case, and I would like for the counsel to show on the record where the witness said that?

Mr. HEITMAN: He said it was his own private affair.

The REGISTER and RECEIVER: What are you trying to do?

Mr. LAMAR: I am trying to get this witness to testify what paper was in his hands that he looked at after he was asked a question and before he answered it. The question was raised at the time and Your Honor sustained the objection that he ought not to answer that question without stating what that instrument was, but he 05 went on and answered it, and it is in the record. (The stenographer here read the question and answer referred to, as follows: "Q. Now what was its value in 1895, if you know? A. 250."

The REGISTER and RECEIVER: The objection is sustained to anything more said about the paper.

Mr. LAMAR: I ask the Register and Receiver to caution the witness not to talk to any one about his testimony.

The REGISTER and RECEIVER: The witness is instructed that he is not to talk to any one in regard to what he is going to testify about this evening.

Thereupon a recess was taken to 7:30 o'clock, p. m.

MARCH, 29, 1902—9 o'clock a. m.

Hearing resumed pursuant to adjournment.

Present the Register and Receiver, and the same counsel as yesterday.

GORDON DAUGHARTY.

Cross-examination resumed by Mr. LAMAR:

Q. Mr. Daugharty, yesterday in your statement you mentioned as being on the land in controversy a barn which none of the other witnesses have found to have been on the land in controversy, in November 1897. I now desire to refresh your memory somewhat in regard to that, in order that you may be given an opportunity to correct your testimony if it is in error. You moved into the Roberts improvements on the right of way in April, 1897, did you not?

A. Yes sir.

606 Counsel and stenographer were instructed that hereafter nothing shall be entered upon the records except questions and answers and the ruling, unless counsel especially request that matter in the nature of argument be entered.

Q. Well, now, at that time is it not a fact that your blacksmith shop and cattle barn remained on the Catlow place for a while.

A. No.

Q. They did not remain on the Catlow place a while?

A. No.

Q. When was it Mr. Catlow gave you notice to take your barn and blacksmith shop off of his place?

A. That spring, the same spring I moved off. It was in April of that spring, in 1897.

Q. Do you remember the tent you had over your hay?

A. I do.

Q. Wasn't that there the first winter after you moved into the Roberts property?

A. That hay was put there the same summer that I moved on the Roberts place.

Q. And it was covered with a tent for that year?

A. Yes but the buildings was completed about two weeks afterwards.

Q. Two weeks after what?

A. After I set the hay in.

Q. How long did the tent stay over the hay?

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A. A couple of weeks.

607 Q. In building that barn you dug holes and stuck up posts, didn't you?

A. Yes sir.

Q. As a frame work?

A. Yes.

Q. And then laid other poles across?

A. Yes sir.

Q. And put boards or shakes on top?

A. Covered it with shakes.

Q. And the sides were of shakes, too, were they not?

A. Yes.

Q. Where did you get those poles from?

Mr. HEITMAN: I object to that as immaterial and irrelevant.

Mr. LAMAR: I am trying to refresh his memory as to the time.

Objection sustained. Contestee Excepts.

Q. Did you buy those boards from anybody else?

A. I bought the shakes and the flooring from Nagel. I bought the shakes from Charley Monroe, and the flooring and boards from John Nagel, with the remainder of what I tore out in the spring of 1897 that I left. I tore that building all down and moved it and put up this other. Outside of that I bought the balance.

Q. Did you pay for these things in cash at the time, or were they charged?

A. I paid for everything I bought of Nagel and from Mon-

608 roe. The rest belonged to me, the other place that I lived.

Q. Will you state what those cash payments amounted to?

A. Well, I stated yesterday the stable was worth $100, but the stable could not be built for $150.

Q. That is not the question. What did you pay for those shakes that you bought?

A. Well, I don't remember; something like $50.

Q. What did you pay for the other material you bought?

A. Well, I don't remember; something like $35. I paid Monroe $15 for his portion in those shakes, and $51 to Pete Penner.

Q. That $51 was a whiskey bill, was it not?

Objected to as immaterial and irrelevant.

Objection sustained. Contestee excepts.

Q. It was an account, was it not?

A. He owed me that much money.

Q. And you took those things for it, and that is the only way you could get anything out of him, wasn't it?

Objected to as immaterial and irrelevant.

Objection —. Contestee excepts.

Q. You stated that Monroe took $15 for his share. Was he a partner of Penner?

A. Yes.

Q. They were equal partners, I suppose?

A. I don't know that.

Q. But Monroe charged $15 for his, and the other man for
609 his part cancelled a debt of his to you for $51. That is right is it?
A. Yes sir.
Q. And was not Monroe's taken in trade?
A. He owed me that money.
Q. Monroe owed you that much money?
A. Yes.
Q. Then all those things were taken and paid for by debts of those parties to you while you were running a saloon?
(No answer)
Q. Was this the first lumber you bought from Nagel for any purpose?
A. I could not say.
Q. As a matter of fact, was not that barn built in the spring of the year?
A. No sir.
Q. When you left the stand yesterday afternoon did the court warn you not to talk to anybody about this case.
A. He did.
Q. As a matter of fact last night, were you not, with other witnesses, with that paper that you had in your hand yesterday, going over this whole case?
A. No sir.
Q. Didn't you have a paper, and were you not talking about this case last night?
A. No sir.
Q. You will swear to that, do you?
A. Yes sir; I swear to that.

610 Witness excused.

JASON EDWARDS sworn on the part of the contestant, testified as follows:

Direct examination.

By Mr. HEITMAN:

Q. State your name, place of residence and occupation?
A. My name is Jason Edwards, Clarks Fork, Idaho, laborer, working the woods.
Q. How long have you lived in Clark's Fork, Mr. Edwards?
A. I have lived there on and off for twelve years.
Q. Are you the Jason Edwards mentioned by the witnesses heretofore examined as being the user of a dwelling house on lots 1 and 2 in block 9 of the land in controversy?
A. Yes sir.
Q. To whom did that building belong in November, 1895?
A. It belonged to me.
Q. When did you build it?
A. In October, 1895.
Q. What was that building worth in November, 1895?
A. It was worth $150 to $200.

Q. For what purpose was that building used in November, 1895?
A. It was used for a dwelling.
Q. By whom?
611 A. By myself and family.
Q. Did you have any other improvements on the land in controversy *on* November, 1895?
A. I think not.
Q. For what purpose was that building used in November, 1897?
A. For a dwelling house by myself and family.
Q. What was its value in November, 1897?
A. From $250 to $300.
Q. State whether or not between November, 1895 and November 29th, 1897 you made any other improvements on this land in controversy?
A. I built a kitchen on.
Q. What was the value of that kitchen in 1897?
A. About $100.
Q. State whether or not you made any other improvements, constructed any other buildings prior to November, 1897 anywhere on the land in controversy?
A. I built a barn.
Q. Where did you build this barn?
A. I built it right back of these lots on the street.
Q. About when did you build this barn?
A. I built it in September, if I am not mistaken, 1896.
Q. What was the value of this barn in November, 1897?
A. About $50.
Q. State whether or not, between November, 1895 and November 29th, 1897, you had any conversation with John E. White,
612 the contestee and entryman in this case, with reference to your building this barn or making any improvements on the land in controversy?

Mr. LAMAR: We object to the question, in so far as the same may call for testimony which under the statutes of frauds would have to be in writing.

The REGISTER and RECEIVER: As the question comes within the fifth and sixth issues, the objection is overruled.

Contestee excepts.

Mr. LAMAR: We would like to have the record show that counsel gave the assurance that this would come under the fifth inquiry.

The RECEIVER and REGISTER: I don't think it is necessary for the record to show that.

A. Yes sir.
Q. When was it and what was it; just go on and state in your own way.
A. When I went to build the barn.
Q. Give about the date. I believe you said it was September, 1895.
A. It was in Septe*b*mer, 1896. John E. White came to me and told me that, to protect himself in the townsite fight he had to forbid me from building the barn.

Q. State what else.

—. Then he told me that I understood the feeling between him and me, and that I was all right in building whatever I wanted to.

Q. Was that all he said?

A. That was about all he said.

613 Q. Did you have any further conversation with him about this townsite?

A. I met him that evening on the railroad track close to the depot, and we got to talking about the townsite, and he told me that he had men that were willing to put up $12000 the minute he got his decision to improve the townsite.

Q. When he told you that you and he were all right, and that you could go ahead and build, what did he say?

Objected to as leading, suggestive, and as cross examination of his own witness.

A. Well, I have stated about what he said.

Q. After you had this conversation with White, state what you did if anything with reference to his building this barn?

Objected to because it has already been covered.

A. Yes, I finished the barn.

Q. When White told you that he had some parties who would invest $12,000 in improving this townsite, did he state anything further about the townsite?

Objected to as leading and suggestive, and an attempt to cross examine his own witness, as he has already stated what the conversation was.

Mr. LAMAR: Counsel for contestant is asked whether or not in the conference had with the witness at this point any reference was made to the subject matter of this question.

Mr. HEITMAN: I refuse to answer. You have no right to catechise me in this manner.

614 Mr. LAMAR: Then we object to the witness testifying, in response to this question, after having had a conference with counsel, subsequent to the time at which the same was propounded. Objection overruled. Contestee excepts.

A. He told me at this time that inside of a year from the time he got the decision, if he got it, that he would be worth $75,000.

Q. State whether or not, in November, 1895 and November, 1897 you had any conversation with George Roberts relative to a contract between Roberts and White, whereby White agreed with Roberts that if he obtained title to the land in controversy he would sell some of the lands in controversy to Roberts for townsite purposes?

Mr. LAMAR: I object to that, first, because anything which Roberts (who at the prior hearing had in 1896 disclaimed any connection with or claim on the townsite) may have said to the witness would be hearsay and not competent evidence; second, because, to have been a contract with respect to which evidence could be taken, such contract must have been in writing, and the writing itself would

e the best evidence of its contents. Third, because it appears of
ecord that the contestants claim that whatever contract there was in
rit-ng, and before any testimony can be introduced with respect
ereto the alleged written instrument itself must be produced or
s absence accounted for. Fourth, because in the sixth specification
by the department for this supplemental hearing it is spe-
15 cifically stated that the injuries must relate alone to a written
contract. Fifth, because no conversation between Mr. Rob-
ts and the witness could be competent evidence under any view
f the case unless Mr. White himself was shown to have been present
hen the conversation occurred.

Mr. HEITMAN: I will withdraw that question and ask another one.
want to show him this affidavit first, as he has a right to refer to
ything he has made in this case.

Q. State whether or not George Roberts, prior to November 29,
owed you a contract Roberts had with John E. White, contestee
nd entryman, whereby John E. White was to deed to Roberts all
e town lots he would need for his buildings in Clarks Fork, and
at he, White, was thereby bound not to sell to any other parties
y town lots to build any hotel or saloon upon anywhere near the
pot.

Objected to on the ground that the question is not limited within
e scope of the inquiry, in that it does not appear that this contract
s shown subsequent to November 27th, 1895.

Objection sustained. Question withdrawn.

Q. State whether or not at any time between November 27th, 1895
nd November 29th, 1897 George Roberts showed you a written
ntract purporting to be between Roberts and John E. White rela-
ve to any of the lands of the property in controversy?

Mr. HEITMAN: I ask your Honor, for the protection of
6 the witness, that he be allowed to refer to the affidavit he filed
heretofore, dated September 25th, 1895.

Mr. LAMAR: We object, first, because the time stated in the affi-
vit is anterior to November 27th, 1895; second, because it was
ade subsequent to November 27th, 1897, and contains no facts or
tements between November 27th, 1895 and November 29th, 1897;
ird, because the proper foundation has not been laid for the ques-
on, and other objection if necessary.

The REGISTER and RECEIVER: I will sustain that on the ground
at it is not within the scope of the inquiry. Permission will be
anted to the witness to examine the affidavits, but not to state its
nents; simply refresh his memory on the points involved Con-
tee excepts to his being permitted to examine the paper in question.

A. Not between those dates.

Q. State whether or not he ever showed you such a contract?

Mr. LAMAR: We renew the objection.

Objection sustained, but the answer is not excluded.

A. Yes sir.

Q. Who had that contract?

Mr. LAMAR: We renew the objection.

A. George Roberts.

Q. Do you know where that contract is now?

Objected to for the reason that the contract is not defined;
617 it is not alleged that it is signed by anybody.
Objection overruled. Contestee excepts.

A. No sir.

Q. Was that contract ever in your possession or under your control?

A. No sir.

Q. What were the contents of that contract, if you know?

Mr. LAMAR: We renew all the general objections made above, and further object to the statement as the contents of the alleged paper until the foundation has been shown.

The REGISTER and RECEIVER: I will sustain the objection as to parole evidence giving contents of the written instrument without accounting for its absence, but the answer is not excluded. Contestee excepts to the ruling.

Mr. GRAHAM: We desire to have our exception entered in the record, and are willing to pay for it. We object to the witness answering the ques-ion and stating the contents of this alleged written contract, for the reason that he has already testified that he did not see this contract between November 27th, 1895, and November 29th, 1897, or at any time subsequent thereto.

Objection overruled. Contestee excepts.

A. I don't know.

Cross-examination:

By Mr. LAMAR: You are a townsite claimant, are you not?
618 A. I don't claim the townsite; I claim the lots where I live.

Q. You are personally interested in the outcome of this contest, are you not?

A. I am interested in protecting my home, that is all.

Q. In doing so, you are stating everything which you can to support your claim?

A. I don't understand that question.

Q. You are here to testify, so far as you can, to support the claim of the townsite through which you expect to gain your home. Is that it?

A. I am testifying to the truth.

Q. Are you desirous of all of the truth in connection with the controversy appearing on the record in this case?

A. Yes sir.

Q. You want all the truth here, do you?

A. I want the truth in this case, what I know.

Q. You want the truth in this case on both sides, do you?

Mr. HEITMAN: I object to the manner of the question. He has testified that he was testifying to the truth.

Objection sustains. Contestee excepts.

A. I am perfectly willing the truth should come up on both sides

Q. You refer to this alleged contract. In whose possession was that alleged contract the last time you saw it or when you saw it?

619 A. George Roberts' possession.

Q. Is it still in his possession?

A. I could not say.

Q. Have you reason to believe that it is not in his possession?

A. I could not say whether it is in his possession yet or not.

Q. Have you any reason to believe it is not in his possession still?

A. I have no reason to believe one way or the other.

Q. I want to ask whether or not you ever made any effort to get Mr. Roberts to come here and produce that instrument?

A. No sir.

Q. Have you made any effort to keep him away from here.

A. I wrote Mr. Roberts a friendly letter and told him he had no interest there, and that I had, and I was coming here to swear to the truth, no matter who it hurt.

Q. Why did you write him such a letter? Did you think that would encourage him to come here?

A. It didn't make any difference to me whether he came here or not. I wanted him to know how I felt about the case.

Q. Made no difference to you whether he came or not?

A. No sir.

Q. Why, if you wanted this written instrument produced

620 here, why didn't you want him to come and produce it? Did you ask him in that letter to send you that written instrument or to bring it?

A. No sir.

Q. If you wanted it, why didn't you ask him?

A. Because I knew the feelings between George Roberts and the townsite people.

Q. Did you in your letter make any threat to George Roberts not to come here?

A. I don't know whether I did or not.

Q. Think now carefully, Mr. Edwards. As a matter of fact, didn't you threaten George Roberts not to come here?

Mr. HEITMAN: If you have that letter I think it is the best evidence.

Q. Didn't you threaten George Roberts against coming here?

A. It depends on what you call threatening.

Q. What do you call it? Didn't you write him a letter which you thought was calculated to keep him away from here?

A. I told him in that letter I would like to meet him here.

Q. Will you swear you told him in the letter you would like to meet him here?

A. I would not swear that I would like to meet him here, but that I would like to meet him.

Q. Where did you say you would like to meet him?
621 A. I said I would like to meet him on friendly terms.
Q. But if he did not come on friendly terms you did not want to meet him?
A. I don't think I said that.
Q. Where did you want to meet him? Did you ask him to come here?
A. I don't remember.
Q. Did you want him to come here when you wrote that letter?
A. It made no difference to me whether he came or not.
Q. Did you want him to come here when you wrote that letter? Was your letter calculated to encourage him to come here or not or to stay away?
A. I don't think it was calculated either way. I simply told him I was going to be here, and that I would like to meet him on friendly terms.
Q. Did you say you would like to meet him on friendly terms?
A. I don't know whether I said here or not.
Q. Why did you write him at all if you were not on friendly terms?
A. I have a right to write to any one I see fit to.
Q. How long is it since you have written to him before?
A. I don't think I ever wrote him a letter before in my life.
Q. This is the only letter you ever wrote to him?
A. I guess it is.
622 Q. How long before this hearing was it that you wrote him?
A. I don't remember now how long.
Q. Was it a week?
A. I think it was.
Q. About a week before this hearing?
A. I don't say it was.
Q. That you wrote him the first letter you have ever written to him in your life? How long ago was it you spoke to him?
A. I spoke to him the last time I ever saw him.
Q. How long ago was it you saw him?
A. I saw him when I left Clarks Fork, when I sold out to Daugharty.
Q. Why did you write him just at this time and say you would like to meet him on friendly terms? Didn't you as a matter of fact, Mr. Edwards, write a letter to Mr. Roberts which you hoped would keep him from coming here?
A. I told you before it didn't make any difference to me whether he came or not.
Q. Did you say anything in the letter about his past life, or anything like that?
A. I think I did.
Q. Why did you do that if you wanted him to come here? What did you say?
A. I don't remember what I said.
Q. How many sisters has George Roberts?

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Objected to as irrelevant, and should therefore be excluded from the record.

623 Mr. LAMAR: I want to refresh his memory as to what he said.

Objection sustained. Contestee excepts.

Q. Is that the letter you were talking about? (Handing letter to witness, which witness proceeds to read.) I simply ask you if that is the letter.

The REGISTER and RECEIVER: Let him read the letter. Give him time.

A. (After reading). Yes sir.

Q. Did you on March 19th, 1902——

Mr. HEITMAN: I object to any further evidence about this letter or its contents, as the letter having been identified as written by the witness, is the best evidence of its contents.

REGISTER and RECEIVER: The objection is sustained, but the letter can be admitted in evidence, and marked as Exhibit "B."

Mr. LAMAR: I desire to read the letter in evidence.

Mr. HEITMAN: I object, because it is his evidence, and he can not introduce it now on cross examination.

Q. What did you mean when you said, "George, I don't want to bring up anything that will hurt you in any way, but I have got an account of you and your sister's birth records from Assumption, Ill., and am prepared to prove anything in regard to things that have come up before this between you and her." What did you mean by that?

A. I think that is a family matter, one I don't believe I have to answer it.

The REGISTER and RECEIVER: No, I don't think so.

624 Q. What did you mean by saying this? Why had you got this record from Assumption, Illinois, at this time?

Objected to as immaterial and irrelevant.

Objection sustained. Contestee excepts.

Mr. LAMAR: We insist on the answer as it refers to the credibility of the witness.

A. It is a family affair and I refuse to answer it.

The REGISTER and RECEIVER: It is a family history, and something that cannot be inquired -to in the courts.

Q. What did you mean when you said in this letter, "J. E. White it telling that you will be his best witness on the townsite case. George, I don't want to bring up anything that will hurt you in any way, but I have got an account of you and your sister's Birth Records from Assumption, Ill., and am prepared to prove anything in regard to things that have come up before this between you and her." Now I will ask you why it was you got this record and referred to this record to Mr. Roberts at this time?

A. I did not get the record at this time.

Q. Why did you refer to it at this time?

A. If he came here I wanted him to swear to the truth.

Q. And you brought up this record and told him about it in order to induce him to come up here and swear to the truth. Is that it?

A. No sir. If he came here I simply wanted him to
625 swear to the truth, and that is the reason I wrote him that letter.

Q. If you did not want to go into this family history business, why is it you said, "I am prepared to prove anything in regards to things that have come up between you and her before this?"

A. I refuse to answer in regard to the family matter, the family history.

The REGISTER and RECEIVER: You can answer that question.

A. I think I have answered that, when I said that I wrote the letter, so if he came here I wanted him to swear to the truth.

Q. If you wanted that alleged contract to come out here, why didn't you ask him to bring that?

A. Well, I don't know as I thought anything about the contract at that time.

Q. Had you forgotten about the contract?

A. I hadn't forgotten about it, but I didn't mention it in the letter.

Q. You had sought this hearing on the strength of a statement as to what that contract contained, and when you get on the stand here you say you don't know what it contains. Is not that true?

A. I have not stated that I knew what the contract contained.

Mr. LAMAR: We ask you to have read as evidence in this case the affidavit of September 25th, 1899, made by this witness in this cause and filed with the papers.

626 Mr. HEITMAN: I object to that.

Mr. LAMAR: I will withdraw the offer at the present time, but that will not prevent us from introducing it at a later time.

The REGISTER and RECEIVER: No.

Mr. LAMAR: I think this letter, it having been identified by the witness, ought to be introduced as a part of the cross examination.

The REGISTER and RECEIVER: It may be marked as an Exhibit.

Said letter with the envelop were marked Contestee's Exhibit "B."

Q. Mr. Edwards, in regard to the notice which Mr. White gave you prior to the building of your barn, about which you testified in your direct examination, was that notice in writing?

A. He had a paper in his hand that he claimed to be reading from. I did not read the paper.

Q. He read to you from the paper?

A. Yes sir.

Q. Did he mention—not leave the paper with you?

A. No sir.

Q. State whether or not this is, according to your best recollection, the language of the notice: "To Jason Edwards, Esq., Clark Fork, Idaho: You are notified not to build or otherwise trespass upon the land that has been adjudicated to me as a homestead by the

United States land office at Cœur d'Alene; and you are further notified that if you persist in doing so, that I shall by process of
27 law enjoin you from moving any improvements you shall place upon the same and shall hold them as my personal property. Dated October 27th, 1896. Respectfully, John E. White."
Is that the notice or substantially the notice?

A. I can't remember the language he used in the notice at all; I have no record of it.

Q. He read it from a paper.

A. He read it from a paper.

Q. And your recollection is that you have not that paper?

A. No sir, I have not.

Q. As you stated in your examination, he gave you this notice. Was there anything in what I have read to you that is incorrect as the contents of that notice?

—. ——.

Q. It may be correct?

A. It may be correct and it may not be correct.

Q. Mr. Edwards, returning to that letter you wrote to Mr. Roberts, Exhibit "B," whom did you show it to before you sent it?

A. I did not show it to anybody.

Q. Whom did you talk to about writing it, among the townsite claimants, before you sent it?

A. I talked to my wife.

Q. Whom else?

A. I just talked to my wife about it.

Q. Can you swear that you did not talk to Moses P. Whitcomb?

28 A. I never remember of mentioning it to Moses Whitcomb.

Q. Can you swear that you did not talk to Moses Whitcomb, or mention it to him?

A. I swear I never remember of talking of it to Moses Whitcomb.

Q. Will you swear you did not show it to Mose Whitcomb.

A. I swear I did not show it to Mose Whitcomb.

Q. Will you swear that you did not tell Moses P. Whitcomb that you had written it?

A. I never remember having any conversation with any one about the letter excepting my wife.

Q. Mr. Edwards, did you say you resided in this house from November 27th, 1895, to November 29th, 1897?

A. I have had my goods there ever since; I have been away a month or two at a time, perhaps three months.

Q. But have you considered it your home?

A. Considered it my home and always made it my home.

Q. As a matter of fact, have you not at the same time been claiming a home elsewhere on a homestead?

A. No sir.

Q. During this whole period, do you claim you have never taken up a homestead claim?

A. I have never put up a notice on a homestead claim in my life.

629 Q. That is not the question. Have you claimed land as a homestead during this time?

A. I lived in a house at Smeads on unsurveyed land three or four months; done work there, and came back at Clarks Fork, and left my goods, while I was at Smeads, the most of them at Clarks Fork.

Q. When was that?

A. I could not say positively just when it was.

Q. As a matter of fact, didn't you claim this land for the purpose of cutting timber off of it?

Objected to as immaterial, irrelevant, and for the further reason that you cannot compel a witness to incriminate himself by making him admit he has cut timber off of government land.

Mr. LAMAR: We do not insist upon the answer because of his constitutional right.

Objection sustained.

Hereupon a recess was taken until 1 o'clock p. m., this 29th of March, 1902.

Afternoon Session.

Hearing resumed.

Cross-examination of JASON EDWARDS continued:

Q. Mr. Edwards, you said the house, as originally constructed, cost $150.

A. I built it in 1895, $150 or $200.

Q. Have you any bills or anything of that kind to refresh your memory as to cost of materials.

A. No sir.

Q. From whom did you purchase materials?

A. Purchased it from John G. Nagel.

630 Q. Were they charged, or was it paid cash or how?

A. I don't remember whether I paid anything down or had it all charged.

Q. There was an account between you and Mr. Nagel at the time?

A. Yes sir.

Q. And his books will show both the time and the amount paid?

A. I could not say whether his books would show it or not.

Q. Who furnished the windows and doors?

A. I got them at Whitcomb & Nagel's store; I believe Nagel was a partner at that time.

Q. Were they charged or in cash?

A. I could not say.

Q. In putting a value on this do you compute from the value of the materials or the value of labor as well as materials?

A. Both.

Q. According to your best recollection what did you pay for the materials that went into this house?

A. I don't remember what I did pay.

Q. Mr. Edwards, I desire to refresh your recollection, if I can, as to the exact time this original building was constructed. The testi-

mony of Mr. Whitcomb at the prior hearing was in response to the inquiry as to what buildings were on the land November 25, 1895, fails to mention this particular building of yours. Are you
631 certain the building was erected before November 27, 1895, or just after that.

A. I am quite certain the building was erected in October, 1895.

Q. Where did you first commence to build it? Where it finally rested?

A. I first commenced to build it on the right of way.

Q. And why did you remove it from the right of way?

A. Mr. White advised me to move it from the right of way.

Q. Is it not a fact that after your foundations were laid Mr. Eplin as the foreman of the road directed you to move off the right of way?

A. I don't think so; I think we had some talk, and Mr. White advised me to move it from the right of way.

Q. State whether or not at that time Mr. White notified you of his claim and against placing it on his land off the right of way, in the presence of W. A. Eplin?

A. He came there and notified me not to build it. He says, the same as he told me when I built the barn, that he had to notify me in order to clear himself, in order that there would be no claims against him on the townsite.

Redirect examination.

By Mr. HEITMAN:

632 Q. When did you begin to build this house on the right of way?

A. In October, 1895.

Q. When Mr. White advised you to move off the right of way and to build it on the townsite, what did he say?

Objected to because he has not said that Mr. White advised him to built it on the townsite at all; he says just the contrary.

Objection sustained. Contestant excepts.

Q. When Mr. White advised you to move the building from the right of way what did he say?

Same objection. Overruled. Contestee excepts.

Mr. LAMAR: I object to it further on the grounds that the witness has already stated what Mr. White said on that occasion, and this is in the nature of cross examination of counsel's own witness.

Objection overruled. Contestee excepts.

A. He told me he had wired to Missoula, and they had told him I better not build on the right of way, and he started and walked away, got about half way to the railroad track, about 100 or 150 feet from where I was, and turned around and spoke to me, and told me to come where he was, and I went where he was, and he told me to move back off the right of way onto them lots.

Q. What lots.

A. The lots that I built on.

Q. When was it he told you that it was his duty to give you a notice not to build on the townsite?

633 A. I would not be certain whether it was that night or the next morning that he brought Mr. Eplin.

Q. What did he say at that time.

A. He had no written notice or anything; he just simply said that he had to forbid me to build on them lots in order to protect himself.

Q. Was there anything further said at that time about your building on the lots?

I object to that as being cross examination of his own witness.

Overruled. Contestee excepts.

A. Not that I remember.

Recross-examination:

Q. You say that this notice that White gave you was made after you and he had the conversation together, or before?

A. We had conversations whenever I met him and whenever I met him. He seemed to have nothing else to say, but to talk about the townsite; and as to just exactly the time and spot, the conversations occurred, I don't know. There was so many of them.

Q. You say these buildings were placed on the lots 1 and 2 in block 10?

A. I think they were; I could not swear positively as to the number of lots and blocks, I haven't looked at the townsite plat.

Mr. HEITMAN: If there is any doubt about that, let him look at the townsite plat.

The plat shown to the witness by the Register and Receiver.

634 Q. Did you build the houses there with reference to the lots?

—. The stakes was set there for the lots all around town, but whether they were numbered or not I don't know now. I just went by the stakes that were set and got inside of the lots outside the right of way.

Witness excused.

REUBEN JOHNSON sworn on part of Contestants, testified.

By Mr. HEITMAN: State your name, residence and occupation?

A. My name is Reuben Johnson; farmer; living now about a mile and a half from Clark's Fork.

Q. How long have you been living near or at Clark's Fork?

A. I came here in the spring of 1890.

Q. Are you acquainted with the land in controversy in this contest?

A. Yes sir.

Q. State whether or not you, between November 27, 1895 and November, 1897, owned or occupied any buildings on this land in controversy?

A. I built on it in 1897, in May.
Q. What did you build?
A. I built a little house; built a little house in April, and moved it back and built on an addition in May.

Mr. LAMAR: I object to the answer in so far as it may relate to what is contained in a written instrument.
635 Objection overruled. Contestee excepts.

Q. What part of this land did you build this house on?
A. (Referring to the map.) I don't know as I can tell about the number; I don't understand this exactly.
Q. State whether or not this building was on the townsite in controversy?
A. It was.
Q. Where was the building situated before you moved it?
A. Right alongside the right of way; it was off the right of way but I moved it back, alongside of the hotel.
Q. What hotel?
A. Butler's. I moved it back still further.
Q. Then when did you build an addition to it?
A. In May 1897.

Objected to because he has not stated that he built any addition on it.
Overruled.

Q. When did you build your addition to this house?
A. In May 1897.
Q. What was the value of this building including the addition in November 1897?
A. Oh, about $200.
Q. State whether or not between November 1895 and November 1897, you used this building for any purpose.
636 A. I lived in it.
Q. When did you live there?
A. I lived there in the spring of 1897.
Q. What time and for how long?
A. I lived there until along in July; I moved back to the ranch I think.
Q. When did you move in it?
A. I moved in there the first of May sometime; I could not exactly tell you the date; the first part of May.
Q. State whether or not at any time prior to November 29, 1897 and subsequent to November 27 1895, you had any conversation with John E. White, the contestee and entryman relative to this building?

Objected to as incompetent and irrelevant.
Overruled. Contestee excepts.

A. I did.
Q. State when or about when that conversation took place, and what it was?
A. It was about the first of May 1897.

Q. Go on and state what it was?

A. I thought at first I would build on the south side of the road, and he told me he wanted that for pasture, and if I wanted to build, to build on the north side.

Q. What did you do then?

A. I went to the north side and built.

Q. Was that all the conversation you had at that time?

A. I think it was; I think that was all.

637 Cross-examination.

Mr. LAMAR:

Q. Mr. Johnson, were there not seven lots that you enclosed somewhere on this land on north side?

A. Yes sir, six, I think.

Q. Where are those lots?

A. These lots are lower down where I built another barn.

Q. You built that barn after 1897 didn't you?

A. I finished the barn in 1898; I commenced it in 1897, bought lumber for it and cleared where it stands in 1897.

Q. Let me refresh your memory. Your fence down there includes all the lots that you had, doesn't it?

A. No, I had another lot up there and another barn, where I built my house.

Q. I mean where the barn is. Doesn't your fence go around all the lots you had there?

A. Yes sir.

Q. Does the fence go all the way up to the street running north and south?

A. Yes sir.

Q. Goes all the way up to the corner there, the corner of the street marked on the map as Pine street, to the west of block 3?

A. I think so; I think that is pretty near down to the lower end of the townsite.

Q. Was the barn which you constructed there in 1897 on the fractional lot or is it a full lot?

638 A. It is a full lot I think.

Q. The next lot east to it is a fractional lot isn't it?

A. I think it is.

Q. Now, will you look at the plat and see what lot it is that your barn is on, that fractional lot being 15, and the next one to it that is not fractional is 14; is 14 the one your barn is on?

A. I think it must be.

Q. And the fence surround- the number of lots that you took there comes up to Pine street does it, the corner?

A. I think it does; it goes up to the corner.

Q. And it comes back to the back of these lots running along the alley?

A. Yes sir.

Q. And it includes the lot on which the barn is; is that right?

A. Yes sir.

Q. Now will you look at that plat and see how many lots there are? Lots 8 to 14; seven lots isn't it?

A. It looks that way, but I didn't think I had but six, and I hardly think I have now, but I won't be certain.

Q. Mr. Johnson, did you not state, and what did you mean, in your affidavit of July 20, 1900, "That affiant cleared, fenced and built upon other lots, amounting altogether to seven lots, his improvements being of the value of $350." To what lots did you refer?

A. I mean all of them; the lots where my house is and
639 barn, here, and where I made the improvements on the other.

Q. This says: "Later, in the season of November 189–, and in that month (referring to May, 1897, he built a house," and then in the former affidavit, it says, "Later in the same season and prior to November 29, 1897, affiant cleared other lots amounting altogether to about seven lots, his improvements being of the value of $250." It looked like you understood there was seven lots there then.

A. Well, that includes where the house is, don't it? One lot up where the house is.

Q. There are seven lots down there.

A. No, there are six down there.

Q. But you have seven down there?

A. I don't think it.

Q. Count them.

A. Well, that is all right; I have counted them a number of times.

Q. You say here you built your barn in November 1897. Now you say you did not complete that barn until 1898?

A. I didn't complete one of them; but one o- them I built in 1897.

Q. Where?

A. There, where the one house is?

Q. But you say this barn that was built in 1897 was on other lots, amounting altogether to seven lots. Where you built your barn, you spoke of that as having been built in 1897.

640 A. I didn't get through with the barn until 1898, the one barn. The other I built in 1897.

Q. Do you mean to say that that other lot you built a barn on at all?

A. Yes sir.

Q. Is it there now?

A. Yes sir.

Q. Did you ever keep any horses in it?

A. Yes sir.

Q. When?

A. In 1897.

Q. Are you certain that this interview between you and Mr. White was on May first, 1897?

A. Yes sir.

Q. You swear that it was May first, 1897?

A. About the first of May 1897.

Q. Where were you standing when you had it?
A. Coming along the railroad; just been over to those other lots on the south side.
Q. But this conversation took place on the railroad track, did it?
A. Yes sir.
Q. Whereabouts on the railroad track?
A. Along by the section house.
Q. Out in the direction from the depot where this barn is, was it?
A. Well, no it is right east of the depot.
Q. Did you point out to him then the seven lots you wanted?
A. No sir.
641 Q. Did you tell him how many lots you were going to take?
A. No sir.
Q. You thought his authorization was general enough to take in all the lots off the railroad, did you?
A. I don't understand you.
Q. You thought that he meant that you could go there and fence up any lots you wanted to take in the whole piece?
A. Yes sir.
Q. Take the whole north side of the railroad if you wanted it, could you?
A. I thought he told me to go and take some lots, yes.
Q. And you went there and fenced in seven of them and have taken them?
A. I don't think there is but six
Q. You don't think there was but six that you fenced in response to this conversation?
A. Yes, sir, outside of the first one where the first house was.
Q. But you are not mistaken about your fence running along that street, are you?
A. I don't think I know anything about that street; I know I built a fence around the block there.
Q. You know there is a street in there to the west of your fence?
A. Yes sir, with a street in to the south of the fence.
642 Q. And you know that it is a fractional lot in west of your barn?
A. I think it is, I never examined it very close.
Q. So you never had any other conversation with him on the subject?
A. No.
Q. You felt like if you had taken the whole thing in off the railroad you would have been all right?

Objected to as immaterial and irrelevant and argument.
Sustained. Contestee excepts.

Q. Was there any one else present when this conversation took place?
A. No sir.
Q. Did you know then that there was a contest existing between him and the town?

A. Yes sir.
Q. Don't you know it has continued ever since?
A. I think I do; I have not known of it being settled yet.
Q. Are not you claiming these very lots through the town now?
A. Yes sir, some of them; I have sold one; that is, sold a building and my right to the lot; sold three I guess. I bought another house and I sold that.
Q. What lots did you sell?
A. I sold the lots back of the hotel there, the Butler building used to be called the Butler building. And then I bought a house and lot of Wilson.

Q. Well, that is after 1897. Confine your testimony to
643 1897. Did you help yourself to any other lots in there?

Objected to as immaterial, irrelevant and not proper cross examination.
Sustained. Contestee excepts.
Mr. LAMAR: I call for the answer.

A. I bought a couple more lots of Mr. Black—isn't that his name? Jim was a witness to that. I bought them and made out the deed.
Q. Place the deed on record?
A. I did; it is on record now.
Q. When?
A. About a month ago.
Q. Are those — two lots you negotiated or attempted to sell to Wilson Johnston?
A. No sir.
Q. They are two more are there?
A. They are two more.
Mr. HEITMAN: A good deal of real estate business going on, in addition to other enterprises.
The WITNESS: That's the way I made my money.
Q. That Johnston transaction was subsequent to November 27, 1897, wasn't it?
A. That was made in 1902 I think; this last spring I sold that house.
Q. Now you say you lived on this land from about the first of May 1897 until after July 1897?
A. Yes sir.
Q. Where were you living?
A. Living in the house I built an addition to.

644 Q. Commenced living in the house on May 1st, 1897?
A. Yes.
Q. And lived there until July 1897?
A. I think it was about the last or middle of the month of July that I moved back to the ranch.
Q. And then you move- back to your ranch?
A. Yes.
Q. Who if any one was living in the house with you at the time you were living on the land in 1897?
A. Tom March.

Q. Who did you say you bought that house from?
A. Forman.
Q. Something was said yesterday about your having a deed from Forman, or a bill of sale. Have you such a paper?
A. Yes, a bill of sale.
Q. Will you let me see it?
A. I haven't got it with me.
Q. Where is it?
A. I think it is in Washington, I sent it there.
Q. When was it sent there?
A. That I could not tell you exactly.
Q. Was it ever recorded?
A. No sir.
Q. Was it ever acknowledged?
A. I don't think it was; just a bill of sale.
Q. When was it dated?
A. I think in April or the fore part of March; I can't tell you certain. March or April, 1897.

645 Q. What was the consideration passing from you to Forman for this old house?
A. I hardly remember.
Q. Did you pay him money?
A. Yes sir.
Q. How much money?
A. That is what I say, I hardly remember whether it was $25 or $35 or $50.
Q. Who did the work on that house when it was built?
A. Tom March and Tom McWillams.
Q. Who did the work on Forman's house, the addition to it made about the same time?

Objected to as immaterial and irrelevant.
Overruled.

A. The house I bought of Forman?
Q. No, Foreman's own addition that he put up, that you moved over that year about the same time? Did not Tom March work on that addition?
A. I think he helped me awhile, yes, I think he worked on it.
Q. How long did he work on it?
A. I could not tell you.
Q. He worked all the time it was being put up, didn't he?

Objected to as irrelevant.
Sustained. Contestee excepts.

646 Q. Now, after this house which you say McWilliams and March did the work on in putting it on that lot that you have claimed, there was an addition put to that house, was there?
A. Yes sir.
Q. Did you embrace that addition in your answer, or was that put there after 1897?
A. That was put there in May 1897.
Q. As well as the old house that was moved off the right of way?

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A. The old house was moved over there in March or in April.
Q. And the addition was put on?
A. The first of May, 1897.
Q. And on the first of May 1897 you were living in the old house?
A. Yes sir.
Q. And you stayed there until July?
A. Yes sir.
Q. And in May sometime this addition was put on there?
A. Yes I lived in the house when I built the addition.
Q. Now, at that time, Mr. Nagel has said that lumber was charged to you on his books?
A. I presume it was.
Q. Did Mr. Nagel owe something at the time?

Objected to as immaterial, irrelevant.
Objection sustained. Contestee excepts.

A. Well, I don't know whether I was on him or he was on me; we had more or less dealings all the time, and one of us was on the other all the time.

647 Q. You were furnishing him logs?
A. Yes.
Q. Where were you getting them?
A. Off my land.
Q. Had you then made a homestead claim?
A. Yes sir, and proved up on it.

Objected to as immaterial and irrelevant.
Sustained. Contestee excepts.

Q. Now Mr. Johnson you spoke of there being a barn up there upon this March place. As a matter of fact was not the only outbuildings there a mere woodshed?
A. No sir, I didn't have any woodshed while I lived there.
Q. When was the woodshed put there?
A. Well, I guess there isn't any now. I don't know what this man uses it for, whether he uses the barn for a woodshed; I have not been there to see.
Q. What are the dimensions or size of that out house?
A. Which one do you mean; the back-house or the barn?
Q. What you call a barn.
A. I think it is 16 by 20.
Q. When was that put there?
A. It was put there in 1897.
Q. At the same time you put the addition on?
A. Yes; kept building right along.
Q. Then you owned the March house?

A. That is what I did.

648 Q. In May 1897?
A. Yes.
Q. It had been moved there in March or April?
A. Yes, sir, I think so.
Q. And though you owned that then and was living in it in May, 1897, you were going down south of the railroad on May first,

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looking for a lot to build a house on, wasn't you? Didn't you say so awhile ago?

A. Yes sir.

Q. Going down south of the railroad to find lots to locate lots to build a house on?

A. Yes sir, I wanted to get out of the town a little ways where I could have more land for my cows. I kept eight cows and I was too close to town.

Q. Then as a matter of fact you had already selected your lot when you met Mr. White, because you had your house on it?

A. I had got a little house on it, yes.

Q. Then the lots you had selected and were talking about were the seven lots down there where you got your barn.

A. Yes sir.

Q. Why did you say awhile ago it included that lot up above there?

A. Well, that is what I say it did, altogether.

Q. How could it have included it when you had already selected the other before that time?

A. Well, I have told it to you as straight as I can, and that is all I can say.

Q. In an affidavit dated July 30, 1900, on which the hear-
649 ing is ordered, you say Reuben Johnson "being duly sworn on his oath says: That he is the same party of the above name who made affidavit of incorporation filed for hearing made in behalf of the probate judge of the above entitled matter," in which affidavit you swear that in May 1897 "he completed the building of a house on the south side of the Northern Pacific track on the land in dispute in the above entitled cause, and the defendant White at that time approached him and urged him not to build on the south side of the track, as he desired to use that side for a pasture; that in that month he built the house mentioned in his former affidavit and that later in the same season and prior to November 29, 1897, affiant cleared, fenced and built a barn on the other lots, amounting altogether to seven lots, his improvements being of the value of about $350. That he did all these things on the express proposition and agreement of John E. White." Now, do you mean to say that that house which you say you built before you had the conversation with White, was built there because of what he told you after it was built? In other words, I want to know from you, Mr. Johnson, whether or not you built that house in April, 1897, on account of what he told you you could do in May, 1897, or as a matter of fact weren't you referring to the property where your barn was built later?

A. I wanted to build a house down where I built the barn, yes. Finally I bought a house of Mr. Wilsen close by.

650 Q. Then when you were talking with Mr. White, in response to what Mr. White told you, what you were talking about was in connection with what you did down there on those six or seven lots we have been talking about? That is a fact, isn't it?

A. What do you mean?

Q. I mean what you did in regard to selecting lots in response to our conversation with Mr. White were the lots you selected down here where you afterwards built your barn?
A. Yes sir.
Q. That is it?
A. I think so.
Q. And had nothing to do with the March house?
A. Well, I built up that kitchen on the March house to live in until I could build the other house where the barn is.
Q. Yes, but you say on March first, 1897, you were then living in the March house; didn't you say that?
A. Yes sir.
Q. And you were going down south of the railroad to look for a suburban home, as it were.
A. Yes.
Q. Then you had in mind that land where you built your barn.
A. Yes sir.

Redirect examination.

Q. When did you begin the work of clearing this land on which you built your large barn?
A. I think in June 1897.
Q. How much did it cost you, or when did you finish this work?
A. In 1898.
Q. How much of the work of clearing on these lots did you do prior to November 29, 1897?
A. I cleared most all of it; and whether I broke most all the stumps out I don't remember. I bought the lumber to build the barn; I think it was three or four thousand feet, of Mr. Nagel.
Q. Can you give an idea of how much your improvements on these lots prior to November 29, 1897, cost you?
A. No I cannot.
Q. Did you move any of your lumber on these lots prior to November 29, 1897?
A. I don't think I got the lumber on these lots; I drew it as far as I could, and there was no road cut through, and I had to cut a road through, and I piled it up.
Q. Are these lots enclosed where the large barn is?
A. They was, yes.
Q. State whether or not you built any fence around them prior to November 29, 1897.
A. No I think I built the fence in 1898.

Excused.

CARPENTER WILSON sworn on part of contestant, testified:

Direct examination.

By Mr. HEITMAN:

Q. State your name, residence and occupation.
A. Carpenter Wilson; I live at Clarks Fork, Idaho.

Q. How long have you been living there?
A. Since May, 1894.
Q. Are you acquainted with the land in controversy, the townsite?
A. Yes sir.
Q. State whether or not you own any property, any buildings on this townsite at the present time?
A. No sir.
Q. State whether or not you made any improvements on any part of this townsite between November 27, 1895, and November 29, 1897?
A. Yes sir.
Q. What did you do in the way of making improvements?
A. I cleared two lots, the street and alley way, and fenced them.
Q. When did you do this?
A. This was in the spring of 1897.
Q. About what did your improvements cost you of clearing the land and building the fence?
A. Well, I estimated it was about $100 at the time.
Q. Was John E. White at Clarks Fork when you were making these improvements
A. Yes sir.
653 Q. Did he know you were making these improvements?

Objected to as incompetent, calling for a conclusion or opinion.

Overruled, but the witness instructed to testify to what he knew and not hearsay.

A. I think he did.
Q. Did you see Mr. White when you were making these improvements?
A. Only as he was walking to and from his house to the depot.
Q. Did you see him at any time while you were making these improvements near this ground?
A. I think not; I never remember of seeing him.
Q. Did you think—have any conversation with him?
A. None whatever.
Q. Did he forbid you from making any improvements?
A. No sir.

Cross-examination.

By Mr. LAMAR:

Q. Mr. Wilson, will you state whether or not there were any bushes or trees between the place where you were making clearing and the railroad.
A. Not at the present time, no sir.
Q. Were there at the time you were making them?
A. When I commenced there were, yes. That is, on the place. There was not between the place and the railroad.
654 Q. But there were between where you were cutting and the railroad track?

A. No sir, I was cutting right there where you could see; they were very scattering.

Q. Was there any building ever placed on this land you were clearing?

A. Not that I have known of. You mean was there ever?

Q. On that land you were clearing between 1895 and 1897?

A. No sir, not between 1895 and 1897.

Q. Mr. Wilson, you knew at the time you did that cutting that Mr. White was prosecuting a contest, that a contest was being waged over this land, did you not?

A. Yes I knew it.

Q. You know Mr. White was claiming all the land?

A. Mr. White I think at this time—I would not be sure whether he had the decision first or not, at that time; but I took it in good faith that the townsite would win.

Q. In an affidavit to the commissioner didn't you state that you were relying on the favorable decision of the commissioner?

A. I think I did.

Q. And not upon anything Mr. White told you?

A. No sir.

Q. Don't you remember meeting Mr. White from time to time in the depot during this time?

555 Q. Don't you remember about Mr. White talking about his contest?

A. Not to me.

Q. Didn't you ever hear him talk about the contest?

A. Oh certainly, yes.

Q. Haven't you ever heard him say, and didn't you hear him say about this time, that he was going to claim all the land he was fighting for?

A. If he won it, yes.

Q. And that the people were acting at their peril that went contrary?

A. No, I don't say that.

Q. But you fully understood that he claimed that when you did that cutting, didn't you?

A. Why no.

Q. You fully understood he was claiming the whole townsite?

A. I understood it was in dispute between the two, yes sir.

Q. And you were taking your chances as to whether the town would win or not.

A. Yes sir.

Excused.

Counsel for the contestant stated that he desired to offer the testimony of the witness Forman, but his presence could not be secured until Monday morning. Leave was granted until that time to introduce his testimony, namely, 9:15 o'clock and if not present at that time his testimony will not be taken.

556 Counsel for the contestee called for the books of John G. Nagel and asked that the Register and Receiver direct their production to the opening of the next session.

Mr. Nagel stated: "I shall go home tonight, and I will bring the books here Monday morning."

Thereupon an adjournment was taken until Monday morning, at 9:15 o'clock, March 31, 1902.

MARCH 31, 1902.

Hearing resumed at 9.15 o'clock a. m.

Present, the special agent acting as register and receiver, and the same counsel as before.

REUBEN JOHNSON, recalled on the part of contestant.

Direct examination.

By Mr. HEITMAN:

Q. Mr. Johnson, you stated in your direct evidence on Saturday that you had intended to build in the spring of 1897 on the land in controversy south of the railroad track. Will you state why you did not build there, but built instead on the north side of the railroad track.

Mr. LAMAR: I object to that question, first because the matter was fully covered in the examination in chief of this witness; second, because the building to which he referred was not made until after November 29, 1897, as developed by cross examination; and third, because it is in the nature of cross examination of one of his own witnesses; and fourth, because this case has been closed except
657 only as to the examination of one witness, Mr. Foreman.

Objection overruled, because these are points in the testimony that the register and receiver would like to have explained.

Contestee excepts.

A. After having conversation with Mr. White, I made up my mind it would be better for me to build on the north side of the road.

Q. State whether or not you would have made the improvements on the north side of the track if it had not been for your conversation with Mr. White?

Mr. LAMAR: I object to that as being leading and suggestive, calculated to draw out evidence directly opposed to that of the witness as given on Saturday, the witness having stated substantially that the addition had been built, and he was living in the March house at the time this conversation occurred, May, 1 1897; and furthermore, because the witness finally admitted that the building he had in mind as having been afterward erected in pursuance of this alleged agreement with Mr. White was the barn and other buildings erected subsequent to November, 1897.

Objection overruled. Contestee excepts.

A. No, I do not think I would.

Excused.

Mr. HEITMAN: I have the original bill of sale from George Rob-

erts to Gordon Daugharty. Do you want Mr. Daugharty recalled to identify the signature?

Contestant offers in evidence the original bill of sale, from
658 George Roberts to Gordon Daugherty, dated April 5, 1897, together with all the endorsements thereon, and a letter from George Roberts to John E. White, contestee in this cause, dated July 28, 1897, attached thereto.

Counsel for entryman, while admitting the signature and genuineness of the paper, objected to its relevancy, in that it does not refer to any property on any of the land in controversy, not purporting to convey real estate.

Objection overruled. Contestee excepts.

The same was marked Contestant's Exhibit "B" on supplemental hearing.

Mr. HEITMAN: If your Honor please, I desire to show by Mr. Whitcomb, that he had used all the means and diligency at our command to secure the attendance of John S. Foreman, and that we have been unable to do so, and then I am through with my case in chief.

M. P. WHITCOMB recalled on the part of Contestant:

Direct examination.

By Mr. HEITMAN:

Q. State what effort you have made, if any, to secure the attendance on this hearing of John S. Foreman or J. S. Foreman, who made and filed an affidavit which was used before the department in this proceeding?

Mr. LAMAR: Unless counsel will admit that Moses P. Whitcomb is a protestant in this case, and that the cause is not in the
659 name of the probate judge, I claim that Mr. Whitcomb can not speak for the alleged townsite in the matter of the efforts made to require the attendance of the witness, John S. Foreman.

Mr. HEITMAN: In answer to Mr. Lamar: Contestant's attorney states that Mr. Whitcomb is one of the townsite claimants and all of the townsite claimants are interested in the prosecution of this contest.

Objection overruled. Contestee excepts.

A. I sent a telegram to Clarks Fork, to ascertain if there was any information or anything known of his whereabouts, and there have been three or four telegrams sent from Clark's Fork to different sections of the country trying to locate him, and so far we have failed to locate him. They told me at Clarks Fork last evening the parties in the townsite case——

Mr. LAMAR: We object and move to strike that out.

A. (continued) that if Mr. Foreman showed up on the ground at Clark's Fork prior to the time to get me a message by nine o'clock, that I would have a message here this morning. I have received

none, and therefore exhausted all means I know of to get him in attendance here. He had promised me faithfully that he would be on hand for this contest.

Q. About when did he give you this promise?

A. I think on the land last Thursday, a week ago, he told me in Clark's Fork. I asked him if he would be with us on the contest at Cœur d'Alene on the 26th, he said he would.

Q. Where does Mr. Foreman reside?

660 A. His family are at Clarks Fork. I think he has no located point at present.

Q. Has he any interest at Clarks Fork at the present time?

Objected to because it goes outside of the scope of the inquiry; second, it is leading; and third, it is not proper testimony at this time in this connection.

Objection overruled. Contestee excepts.

A. No sir, he has nothing in Clark's Fork.

Q. Go on and state where he has been living, and where he is living now, and when he left Clarks Fork, if he left there. Give the register and receiver an explanation of it.

A. He sold out at Clarks Fork some two or three years ago, I don't just remember the date, I couldn't swear, he moved to the town called Elberton in the state of Washington, and opened up a hotel at that point, and has been conducting business there, in the hotel business since that time up to within the last two or three weeks. I understand he sold out and is now looking for a location elsewhere. He told me last Friday, a week ago, the day he left Clarks Fork, he was going to Hope, and he thought he would come over on the Great Northern, but did not intend to be gone but two or three days, and then would be back and then would be able to go with us to Cœur d'Alene on this hearing. Since that time we have been unable to find his whereabouts or locate him at any point.

661 Cross-examination.

By Mr. LAMAR:

Q. Mr. Whitcomb, has the Probate Judge made any effort to get him here?

Objected to as immaterial and irrelevant.

Objection overruled.

A. I don't know whether he has or not; I could not state.

Q. Have you asked the Probate Judge to assist in getting him here?

A. I think not, no sir.

Q. You say Foreman's family is back in Clark's Fork now?

A. Yes sir.

Q. Where are they residing there?

A. Well, last night Mrs. Foreman was at our house, taking care of my son's wife, who was sick. The family I think are stopping with Johnnie Lloyd in town; that is where I found them.

Q. He is also a family relative of yours?
A. Johnny Lloyd; yes sir, a relative of my wife.
Q. And you have sent telegrams to the address which Mrs. Foreman has given you?
A. Mrs. Foreman stated that she did not know where Foreman was, we only sent messages I think to Elberton, Washington, to try to locate him there, and I think one message to Spokane.
Q. As a matter of fact when you talked to Mr. Foreman didn't you notice an aversion on his part to come down here?

662 Objected to as immaterial and irrelevant.
Objection overruled.

A. No sir, I did not, Mr. Foreman seemed rather anxious to come down here. I only spoke once to the man about the matter; that was in our store, in the presence of two or three other men, I don't remember who, that we were talking with, and he very readily agreed to come without any persuasion whatever or anything at all. I simply asked him if he would be ready to go down with us on the 26th, and he said he could.
Q. The day had then been set and you told him the day?
A. Yes sir, the day had been set, and I gave him the date of the hearing. He seemed on the contrary rather anxious to come.
Q. November 25, 1897, Mr. Nagel was not residing on this land was he?

Objected to as not proper cross examination.
Objection sustained.

Q. Was Mr. Nagel living on the land in question—on the land claimed in November, 1897, or over on his homestead?
A. Living on his homestead, I believe, with his family.
Q. In 1895, I mean; that is true in 1895 is it not?
A. Yes sir, I think it is true in 1895.
Q. Was C. G. Schindler living on the land in controversy in November, 1895?
A. I think not.
663 Q. Was A. E. Snow coming off and on to the Houston house but prospecting in the mountains?
A. Snow was paying rent on the house all the time during that period, I think, entirely.
Q. As a renter?
A. Yes sir.
Q. Alphonse Oullet?
A. Was doing the same thing.
Q. As a renter?
A. Yes.
Q. T. B. McWilliams was doing the same thing as a renter?
A. Yes sir.
Q. And were these people renting from you?
A. Yes sir.
Q. And Mrs. E. F. Lloyd, was she renting then? Whose house was she living in?

A. I would not be positive whether I sold her the house in 1895 or not; I think I had; I have no record of it.

Q. Was Hasselroth a renter at that time?

A. Yes sir, he was living in one of our houses, the house of Whitcomb Bros. and Nagel.

Q. And Joseph Butler sold out and left there after November, 1895, or before November, 1897?

Objected to as immaterial and irrelevant; the evidence shews Joe Butler was there in 1895, at the time this entry was filed, and other persons succeeded by his purchase to his lands and his business.

Objection overruled.

664 A. Yes sir.

Q. Then of the petitioners for the townsite which was filed November, 1895, whose names are M. P. Whitcomb, Joseph Butler, T. B. McWilliams, Alphonse Oullet, A. E. Snow, J. B. Whitcomb, C. G. Schindler, Mrs. E. F. Lloyd, A. Hasselroth and J. G. Nagel, you and Butler were the only ones living in your own property there; J. B. Whitcomb was living in the store, and the others were renters or living off the place. Is that correct?

A. I think I had sold the Lloyd property to Mrs. Lloyd prior to that time. I am not positive of it but I think I had. Our intention anyway was to give her the property.

Q. She is your sister in law?

A. Yes sir.

Q. How about the others; they were substantially as you have stated, were they not?

A. I think so.

Q. Then you think you had enough to do with this townsite to have something to say about what shall be done?

Contestant objects as irrelevant and immaterial, and being an argument on part of counsel with the witnesses.

Objection sustained.

Q. As a matter of fact, Mr. Whitcomb, in November, 1895, you had a mortgage on Butler's place had you not?

Objected to as immaterial and irrelevant.

665 Objection overruled.

A. I could not be positive on that question. I know we had a mortgage sometime, but I don't know we may have had it at that time.

Q. The property was afterwards taken by your firm was it not and afterwards sold to somebody else?

A. We bought that property in from Mr. Butler and paid him the difference in money between the mortgage and what he wanted for the property, and took it off his hands.

Q. This was before November, 1897?

A. Yes sir, simply did this in order to make the transfer to Mr. Foreman.

Q. Mr. Nagel is positive about this. Is he not right about it?

A. I think so yes, as near as I remember.

Mr. LAMAR: That is all.

The WITNESS: In my testimony Friday or Saturday, when I was on the stand, I stated that John Lloyd was occupying the Butler property in 1897, which I find was incorrect; he did not occupy this property until 1898, and Foreman and family were living in the property instead of John Lloyd, as I stated.

Redirect examination.

By Mr. HEITMAN:

Q. Will you state what other business houses were on this land in controversy November 27, 1895, besides Whitcomb Brothers and Nagel and Butler Brothers.

666 A. The Roberts property.

Q. What was it?

A. It was a hotel, saloon, a store and store rooms.

Q. State whether or not there were any restaurants, laundries or any other business enterprises at that time.

Objected to as leading, because it is covered by prior testimony and is not confined to the right of way.

Objection to the question sustained, but it is ruled that the question may be answered.

A. There was a building known as the Greenough-Butler building, which I think was unoccupied at the time, built for a saloon or store. This laundry building belonged to Butler Brothers, and that was all.

Recross-examination.

By Mr. LAMAR:

Q. You stated before, that Roberts Brothers' store and warehouse were on the right of way?

A. It was on the 200 foot strip of right of way.

Q. There was no other business besides yours and Butler's off the right of way was there in the way of stores?

A. I think no other business carried on.

Q. The laundry was used as a residence at this time?

A. At that time, I think.

Q. And the Greenough-Railton building was on the right of way at the time and vacant?

667 A. There was a postoffice building in use on the right of way in 1895—no, it was moved back off the right of way 1895 and used as postoffice.

Q. The Greenough-Bascomb building was on the right of way at this time was it not?

A. Yes sir.

Q. And has since been taken down, has it not?

Objected to as having happened since 1897.

Objection sustained. Contestant excepts.

Witness excused.

Contestant rests.

Contestee's Case.

JULIUS B. WILLIAMS sworn on the part of Contestee.

Direct examination.

By Mr. LAMAR:

Q. State your name, age and residence.
A. Julius B. Williams; 18 years old; reside at Clarks Fork, Idaho.
Q. When did you go there?
A. I came to Clarks Fork about July 27, 1898.
Q. Are you familiar with the location of the seven lots to which Mr. Reuben Johnson referred in his testimony on Saturday?
A. I don't know where they are, but I am familiar with the map.
Q. After you came to this part of the country, how far did you reside from the place mentioned?
A. About a quarter of a mile, I guess; it is not very far.
668 Q. State whether or not you had occasion to pass by or go over that part of the ground?
A. I was over the ground pretty near every day, did not have anything else to do when I first came and went over the ground looking around pretty near every day.
Q. In fact through the whole town?
A. Yes.
Q. State whether or not at this time when you came, and for some time thereafter, there was any clearing on these lots.
A. There was no clearing on the lots when I came.
Q. Was there any lumber on the lots?
A. No sir, no lumber.
Q. Was there any building on the lots?
A. No sir.
Q. Was there any fence around the lots?
A. No sir.
Q. So far as you could observe, were there any evidences of improvement of these lots whatever at that time?
A. No sir.
Q. Is it not a fact that you could see the whole of that ground from where you lived?
A. Yes sir.
Q. State whether or not you remember that the barn was erected subsequently to November.

Objected to as leading. Objection sustained.

Q. When was the barn in fact built?
669 A. It was built about Thanksgiving, 1898.
Q. Do you remember reference being made in testimony on Saturday to a small frame structure in the rear of Roberts store?
A. Yes sir.
Q. Described by the witnesses for the Contestant as a dwelling. Can you state whether or not that building was on or off the right of way?

A. It was on the right of way.
Q. State how you know this was on the right of way.
A. I know it was on the right of way because — stood in front of Whitcomb's store on the corner of Foreman's walk and took a line across in front of Whitcomb's store and the old postoffice that used to stand there and on down to Jack Catlaw's fence and saw that the building was on the south side of the fence.
Q. You sighted it, you mean?
A. Yes sir.
Q. These buildings by which you sighted did they front or edge the right of way?
A. Yes sir.
Q. State whether or not the north end of the frame building was any distance over on the right of way.
A. There was about six or seven feet behind the north end of the building, the right of way.
Q. You would not be positive about the exact distance?
670 A. No, not positive, but I think there was about that.
Q. There was a pig pen mentioned in the testimony of the other witnesses as being on the rear of the Roberts enclosure. State whether or not that was on or off the land in controversy.
A. It was off the land in controversy.
Q. On whose property?
A. Mr. Nagle's.
Q. Do you remember the condition of the Daugharty barn when you came there?
A. Yes sir.
Q. What was its condition then.

Objected to as incompetent, for the reason that this witness knows nothing of the location of the building on the land in controversy between November 27, 1895, and November 29, 1897.
Objection sustained.

Q. State whether or not the Daugharty barn was completed in July, 1898 when you came there?
A. It was not completed.
Q. State whether or not the blacksmith shop was in any portion of it at that time?
A. He did not have any blacksmith shop in any portion of it.
Q. What if any incident do you recall to fix this matter positively in your mind?
A. Why about a month after I came there, Brock Daugharty, Gordon Daugharty's brother, went up the creek towards Dobbins, killed a bear, and they brought him down and put it in the
671 place that Daugharty has now for his blacksmith shop, for to clean, and we all went over there to see it, and I noted at the time that there was not any floor in the blacksmith shop, and part of the side was not up.
Q. Was there any blacksmith tools in there?
A. No sir, there was not.
Q. This was the first bear you ever saw killed?
A. Yes sir.

Q. Mr. Nagel in his testimony spoke of there being another small building besides the warehouse and the stores, a little frame building there in 1897. Do you remember any other structure?

A. On the land?

Q. On the right of way, and state whether or not it was on the right of way.

A. There was a building that he used for an ice house on the right of way when I got there.

Q. Did he ever have any pig pen attached to it or anything of that sort?

A. There was a shed there extending out in front of the building that the pigs slept under.

Q. Was that building wholly on the right of way?

A. Yes sir, wholly on the right of way.

Q. How wide was the shed?

A. I should think the building was about—

Q. The shed I am talking about.

A. The shed was as wide as the building, and the building was about 13 or 14 feet wide.

672 Q. How do you know that it stood on the right of way?

A. Because the saw dust that the ice was packed in stands in front of Gordon Daugharty's saloon to this day, and his saloon is now on the other side of the railway.

Q. You were there at the time of the fire?

A. Yes sir.

Q. Was there ice in the building then?

A. Yes sir.

Q. State whether or not you remember definitely its location from that incident, the burning?

Objected to as misleading.

Objection sustained.

Mr. LAMAR: I will take the answer.

A. The fire burned down all the building and left the saw dust and ice standing there.

Q. Did it stand on the right of way or not?

A. Standing on the right of way.

Q. Do you remember where Tom March lived?

A. Yes sir.

Q. Was there any barn there when you came?

A. No sir, there was not any barn there.

Q. What if any outbuilding was there?

A. There was a little shed that might be called a woodshed.

Q. Was it large enough to keep horses in?

A. I don't think you could keep a pair of horses in it, you might be able to put one horse in it.

Q. Who was that property reputed to belong to when you came?

673 Objected to as immaterial, irrelevant and hearsay.

Objection sustained.

Cross-examination.

By Mr. HEITMAN:

Q. What relation are you to John E. White?
A. Nephew.
Q. You came to Clarks Fork July 27, 1898?
A. Yes sir.
Q. Where did you take up your abode when you came?
A. I lived with my uncle, John E. White.
Q. How far was his house at that time from these lots on which Reuben Johnson built a barn?
A. As I said before, I think it was about a quarter of a mile, but I would not be positive.
Q. Could you see these lots from Mr. White's residence?
A. I could.
Q. Was there any timber or building between these lots and Mr. White's residence?
A. There was not.
Q. When did you first go onto these lots?
A. Soon after I came to Clarks Fork I rambled over the country like anybody would looking around to see what I could see.
Q. Can you state on what lots in the plot of this townsite that barn was constructed?
A. I can't because I am not familiar with the plat.
Q. You could not identify the lots then on which this barn was constructed by looking at this plat?
674 A. No I don't think I can.
Q. Look at this plat and see if you can locate that barn.
A. I would not be positive, but I think they were right in block 3.
Q. What lots?
A. I don't know what lots; I could not tell.
Q. You say that when you came, there was no clearing on these lots or any of them?
A. There was not any clearing on the land when I came there.
Q. There was no lumber lying on the ground?
A. No sir, there was no lumber lying on the ground.
Q. No building of any kind or character?
A. No building of any kind.
Q. No fence around it?
A. No fence.
Q. When did you first see these lots?
A. As soon as I came to Clarks Fork.
Q. About how long after you came there?
A. About a couple of days, I guess.
Q. Were you on the lots at that time?
A. I was on the lots at that time. Or about where they were.
Q. How often did you see these lots between that time and the time Mr. Johnson erected his barn?
A. Why, every day.
Q. How often were you on those lots?

675 A. Off and on all the time; I did not have anything to do, and I just ran around the country.

Q. You say that the barn was not built until November, 1898?

A. I said it was not built until about Thanksgiving, 1898.

Q. Thanksgiving is always in November, is it not?

A. Yes; about that time.

Q. This Roberts building, when did you first see that?

A. I don't know exactly when I first saw it, but I saw it and noted that it was on the townsite.

Q. About how long after you came there before you saw this Roberts building?

A. I do not know how long it was after I came there; I did not take particular notice as to how long it was. I was looking along down the line and saw that it was not on the townsite.

Q. Why did you come to note that it was not on the townsite but was on the right of way?

A. I don't know how I came to note it, but I happened to see it.

Q. Did you make any measurements?

A. I did not make any measurements only with my eye.

Q. You were about sixteen years old at that time?

A. I was fifteen years old when I came here.

Q. How long after you came to Clarks Fork before you measured with your eyes and became convinced that this Roberts
676 building was on the right of way?

A. I don't know how long it was, as I said before.

Q. Was it a week?

A. I don't know whether it was a week or a month or two months, or how long it was.

Q. Was it a year?

A. No, I don't think it was a year.

Q. Now why was it that you measured with your eye the distance of this Roberts residence from the railroad track?

A. I did not say anything about measuring it from the railroad track. I measured it from a line of the right of way towards the railroad track.

Q. Why did you do that?

A. Because I was looking across there and happened to see it.

Q. What circumstances made you believe at that time that this Roberts residence was on the right of way and not on the townsite?

A. Because anybody looking across there in front of the Whitcomb store and Postoffice could see it was not on the townsite.

Q. What circumstances was it made you notice this at that time—at this particular time?

A. I noted it; I saw it; it was not on the townsite.

Q. You made up your mind then that it was not on the townsite?

A. Yes sir. I did.

677 Q. You did not make any measurements with anything except your eye?

A. That is all.

Q. And you considered your visionary measurements sufficient to satisfy you, did you?

A. Yes sir.

Q. Had you up to this time any experience in making accurate measurements with your eyes alone?

A. No, but I could tell with my eyes about what I thought was right.

Q. You have never measured the distance of this Roberts residence from the railroad yet, have you?

A. No sir, not with a rule or a line or anything of that kind.

Q. Never tried to do anything of that kind?

A. No.

Q. You have known that this litigation between your uncle and the townsite claimants was pending ever since you came to this country, haven't you?

A. Yes sir, I have.

Q. You were brought down here to testify that this Roberts residence was on the right of way?

A. I was not brought down here to testify to that, but after I was down here I heard Mr. Nagel and some of the other witnesses say it was on the right of way, and of course I knew it was on the right of way.

Q. You were not brought down here to testify on that particular point.

678 A. No, sir, I was not; I did not know what I was going to testify to.

Q. Didn't you know that one of the points in dispute in this controversy was as to the existence or non existence of certain buildings on the right of way?

A. Yes, I did.

Q. Then why did you not verify the correctness of your eye measurements with reference to this particular building by actual measurement?

A. I did not have any occasion to go in there with a square or rule and measure it.

Q. You are willing to bank on your eye measurement, are you, rather than accurate mathematical measurement?

A. Not willing to do that, no, but I did not have any occasion to go there and measure it, and so I just give a rough estimate of how far it was on the right of way.

Q. Might you not be mistaken?

A. I might be mistaken as to how many feet exactly it was from the line of the right of way, but I know it was on the right of way.

Q. How many feet might you be mistaken in it?

A. I might have been mistaken in maybe one or two feet.

Mr. LAMAR: Counsel for contestee does not object to the length of this examination, but they ask that if any further cross examination of this character in the nature of repetition is indulged in it shall be charged to the contestant.

679 The REGISTER and RECEIVER: I will do that, provided you consent that during the last four or five days of cross examination I may assume the same prerogative as to your cross examina-

tion, because you must admit there was some irrelevant testimony brought out during that time.

Mr. LAMAR: Then I will ask the Register and Receiver to limit the cross examination within reasonable limits, as this witness has been asked a dozen to twenty times practically the same question.

Q. When you made this eye measurement, where did you stand?
A. I stood on the corner of Foreman's sidewalk.
Q Which corner?
A. The west corner.
Q. How far was that point from the right of way, the points where you were standing?
A. It was on the right of way.
Q. Where was Roberts' residence.
A. His residence was south of the line of the right of way.
Q. How far over the right of way was the Roberts residence?
A. I told you I think it was about five or six feet.
Q. To what object were you looking when you sighted?
A. I was looking at the corner of Jack Catlow's fence.
Q. Where was this fence, on or off the right of way?
680 A. That is on the line of the fence—line of the right of way.
Q. How far was the Roberts residence from the Catlow fence?
A. You mean how far was the residence from the corner of Catlow's fence?
Q. Yes.
A. I don't remember exactly how far it was.
Q. You did not measure that either?
A. No I did not measure that.
Q. Now you say that the Roberts pig pen was on Nagel's homestead?
A. It was.
Q. Did you see Roberts' orchard?
A. I saw Roberts' orchard.
Q. Where was it.
A. Part of it was on Nagel's homestead and part of it was on the townsite.
Q. That was not on the right of way?
A. No, that was not on the right of way.
Q. You say Daugharty's barn was not completed when you went to Clarks Fork?
A. Yes sir, I did.
Q. No barn there at all?
A. There was a barn there but it was not completed; it was supposed to be a barn.
Q. You say there was no blacksmith shop there at all?
A. There was no blacksmith shop there at all? A. There was no blacksmith shop.
681 Q. Was there a building used as a blacksmith shop?
A. It was not used as a blacksmith shop.
Q. There was a building there at that time?

A. The building was there, but it was not completed, had not been completed for a blacksmith shop.

Q. What was the condition of the building at that time?

A. There was not any floor in the building and some of the siding was not up at that time. He used shakes for siding and there was I think two rows all the way across the building that had not been nailed on.

Q. Was there any roof on it, but no flooring?

—. ——.

Q. And some of the siding?

A. Some of the siding had not been put on.

Q. No blacksmith's tools in it?

A. No blacksmith's tools in it.

Q. What was it used for?

A. I don't know what it was used for, but there was no blacksmith shop there.

Q. What was the condition of the barn when you went there?

A. The barn was in the same condition.

Q. Roof on it?

A. Roof on it.

Q. Sides up?

A. Part of the siding was up and part of it was not up and no floor.

Q. Whose ice house was that?

682 A. The ice house that burned down was Gordon Daugharty's.

Q. You say that was on the right of way?

A. Yes sir.

Q. When was that burned down?

A. It was burned down the last part of last year, I think; burned down the same time his hotel burned.

Q. What was it you said about this Tom March house in your examination in chief?

A. I said that the house was claimed by Tom March——

Q. No that was not it. You said something about the Tom March house.

Mr. GRAHAM: I ask that his attention be called to what he said.

Mr. HEITMAN: Yes let it be read. (Testimony in chief was read).

Q. Where did Tom March live when you came to Clark's Fork in July, 1898?

A. I am not sure where he lived; at that time I did not know him.

Q. Was he living on the townsite of Clarks Fork?

A. I don't know where he was living when I got there.

Q. You speak of the Tom March house, what was its condition when you came to Clark's Fork?

A. Its condition was very good.

Q. You say there was no barn there?

A. No barn was there.

Q. No barn anywhere near?

683 A. There was a barn pretty close to the house but it was not inside of this enclosure at all.

Q. You don't know who that barn belonged to?
A. It belonged to Whitcomb.
Q. Then Mr. Johnson did not have any barn near the March house?
A. No sir.
Q. Has there ever been any barn built near the March house?
A. No sir.
Q. There is no barn near to it, is there, except the Whitcomb barn?
A. Yes sir; that is all.

Witness excused.

W. A. EPLIN, sworn on the part of Contestee, testified as follows:

Direct-examination.

By Mr. LAMAR:

Q. State your name, residence and occupation?
A. Name, W. A. Eplin, Clarks Fork, Idaho; section foreman.
Q. At what place do you live?
A. In the section house building of the Northern Pacific railroad company.
Q. How long have you been in the vicinity of Clark's Fork?
A. I came to Clark's Fork September, 1895.
Q. State whether or not you have any interest in the townsite now?
A. I have none.
684 Q. State whether or not you have any improvements on the land in controversy off the right of way?
A. Yes I have a couple of lots fenced; also a small barn.
Q. State whether or not these improvements were there November 29th 1897?
A. They were not.
Q. Mr. Whitcomb when he was on the stand substantially stated that you had signed an affidavit some time ago and you had told him you did not understand its contents. State whether or not Mr. Whitcomb's statement in this regard was true?
A. I did understand the contents of the affidavit.
Q. Did you ever tell Mr. Whitcomb you did not understand the contents?
A. I did not.
Q. Did you ever tell Mr. Whitcomb what the contents of the affidavit were?
A. I did not.
Q. State as near as you can recall, what the conversation between you and Mr. Whitcomb was on that subject at the time, and who, if any one, broached the subject?
A. I went into Mr. Whitcomb's store to do some trading and after I did my trading he says, "I understand you signed an affidavit for John E. White." I said "I did." He says, "I am very sorry because it is contrary to other affidavits." I told Mr. Whitcomb that I

could not help that; I had sworn to the truth and I could not swear to a lie.

685 Q. Look at that affidavit and say whether or not that is the one with reference to which that conversation was had?

A. (Examining same.) Yes sir; this is the affidavit signed.

Q. You have re-read this affidavit since the last question was asked you?

A. Yes sir.

Q. Will you state whether or not its contents are true?

Mr. HEITMAN: I object to the method of the examination.

Question withdrawn.

Mr. LAMAR: We desire to interpose this affidavit as an exhibit to his testimony.

Contestant object, on the ground that where a witness is present and his oral evidence can be taken, his deposition is incompetent.

Objection sustained, but the paper may be filed as an exhibit. Same was marked Contestants Exhibit "C" on supplemental hearing.

Q. Reference was made Saturday to the commencement of the residence of Jason Edwards on the railroad right of way. State whether or not as foreman it is part of your duty to keep clear the right of way of obstructions?

A. It is my duty to not allow any improvements of any kind to be constructed on the right of way belonging to the company.

Q. Do you remember the incident referred to?

686 A. Yes sir; I remember it.

Q. State what, if anything occurred, and the condition of the structure when you arrived at the place first?

A. I noticed this house being built belonging to Jason Edwards on the company's right of way and I went and notified him that he must stop building, that he could not build any building on the right of way without a lease from the company. He said he had applied for a lease. I told him that did not clear me, that he could not go any further with the building, that he must stop where he was. So in my presence he says to his men he had helping build the building,—"We will move it back off the right of way on to White's homestead."

Q. What did they do then while you were present?

A. They took hold of the foundation they had built at the time, just the foundation, and moved it back off the right of way.

Q. State what kind of foundation it was?

A. As near as I can remember it was a foundation of 6x6 timbers, I don't know the exact size; I did not go into details.

Q. Where did you go then?

A. I started to go back to the depot.

Q. Whom did you meet?

A. I met John E. White.

Q. What if anything, did he say to you?

687 A. He says "back with me to where they are building the building."

Q. Did you go?

A. I told him I had already notified them not to build on the right of way.

Q. Why did you do this?

A. For the reason that I thought he was going for the same purpose, as he is under instructions of all agents belonging to the company.

Q. He was then an agent of the Northern Pacific company?

A. He was.

Q. State whether or not you and Mr. White did go back to where they were?

A. We did; I went back with him.

Q. What if anything, was said by Mr. White to Mr. Edwards on that occasion in your presence?

A. He said to Jason Edwards, "I forbid you to build this house on this ground, as I claim this ground as a homestead."

Contestant moves to strike out this evidence for the reason that the conversation is not alleged to have taken place between November 27th, 1895, and November, 1897.

Objection overruled. Contestant excepts.

Whereupon a recess was taken till 1 o'clock p. m. this 31st day of March, 1892, at which time parties met pursuant to adjournment and the examination of the witness was continued, as follows:

688 Q. Mr. Elpin, state whether or not any notice was given you by Mr. White, or anything said to you by Mr. White prior to your clearing the lots you mentioned for building against your doing so?

A. I went to Mr. White and told him that I intended to clear up and fence a couple of lots to use for garden purposes. He said "I can't give you any permission to do any work on this ground or make any improvements, as I claim this ground as a homestead, and will not allow any improvements to go upon this ground.

Q. When was that?

A. That was in 1898.

Mr. HEITMAN: I move that it be stricken out as not being between 1895 and 1897.

Objection sustained. Contestee excepts.

Q. Can you state whether or not the whole of Hasselroth's family were in Clark's Fork on November 27th, 1897, and if not who were?

A. There were two Hasselroth girls living in the house known as the Hasselroth house at that time, and Joe Preston the bridge watchman was boarding there.

Q. Can you state as to the exact time in 1897 that was?

A. I do not know the exact time; I know it was in 1897.

Q. Where was the balance of the family, if you know?

A. They were either at Hope or working for Mr. Brown, I don't know which.

689 Q. State whether or not you saw Mr. Hasselroth in Hope in 1897?

A. No, I can't state that.

Q. When Whitcomb was on the stand, something was said about your approaching him on the subject as to whether or not you had come down here upon this hearing. Who of the two of you first mention the matter, you or Mr. Whitcomb?

A. I met Mr. Whitcomb between the depot and his store on the sidewalk. He spoke to me and we stopped for a few minutes conversation and he mentioned this question of my coming down as a witness, and I told him that I was.

Q. Before you left Clarks Fork, state whether or not you were fully advised as to the law not requiring you to come here unless you saw fit to do so?

A. Yes sir, Mr. Lamar, the day we left Clarks Fork, he told me it was not binding that I should come, that there was no way of compelling me to come here as a witness.

Q. State whether or not Mr. Lamar requested you to come however?

A. He did not.

Q. State whether or not Mr. Whitcomb told you that you did not have to come?

A. Mr. Whitcomb told me that I did not have to come; if I came it was my own free will.

Q. After you stated you were going to come, what did Mr. Whitcomb say to you?

690 A. He said, "It makes no difference to me whether you come or not."

Cross-examination.

By Mr. HEITMAN:

Q. Was any one present when you had this conversation with Mr. Whitcomb about the contents of the affidavit you made in this proceedings?

A. No sir, not that I know of; if there was any body present I did not see them.

Q. Reuben Johnson was not present?

A. I did not see Reuben Johnson.

Q. Mr. Lloyd was not present?

A. Not to my knowledge.

Q. Nobody there except Mr. Whitcomb?

A. Nobody except Mr. Whitcomb as near as I can remember; if there was any body in the building I did not see them.

Q. What was the conversation between you and Mr. Whitcomb about this affidavit?

Objected to as having been related.

Objection overruled.

Q. As near as I can remember, he said, "I understand you signed an affidavit for Mr. White." I told him I had. He said "I am sorry very, because that is against other affidavits."

Q. Did he mention what other affidavits?

A. He did not, and I told him I could not help that, as I had sworn to the truth and I could not swear to a lie.

Q. That was all the conversation?

691 A. Well, that is near as I can remember, of course there might have been some other words said but I don't remember now.

Q. Did you ever have more than one conversation with Mr. Whitcomb about this affidavit?

A. I did not.

Q. When did this conversation take place?

A. I can't tell just when it was, in 1899—September 27 1899, that is right. It was shortly after I came back from Missoula after being in the hospital.

Q. When was it Mr. White, in your presence, notified Edwards about this building?

A. It was in the fall of 1895, as near as I can remember, in October; I don't know just the date.

Q. When you notified Edwards, you say he said to the men who were helping him, "we will move it back on White's homestead?" Who were those men?

A. I can't tell you who the men were. I was a stranger in the place at the time, and did not take notice because I was not interested enough to take notice of the men.

Q. And they moved it back?

A. They moved it back while I was there.

Q. Did you help move it back?

A. I don't know whether I took hold and helped move it back or not, but it was my object to stay there until it was off the right of way, and it was moved while I was there.

Q. What took place between White and Edwards when White notified him, what was said?

692 A. I can't remember what was said; in fact there was not much said. White notified them and we turned away and went to the depot with White.

Q. Did you ever hear any other conversation between White and Edwards about this building?

A. I did not.

Q. Did you ever have any conversation with Mr. Edwards about this business?

A. I did not, except that one.

Excused.

JOSEPH RUSITSHKA FOSTER, sworn on part of contestee, testified:

Direct examination:

Mr. LAMAR: This witness' father's name was Foster and he goes by the name of Foster.

Q. You are Naturalized?

A. Yes, and I have my papers and proved up on a homestead.

Q. Mr. Foster, how long have you been in the vicinity of Clark's Fork?

A. Since the latter part of July, 1891.

Q. What has been your business in the past and what is it now?

A. I learned the carpenter trade at home in Austria, and worked at it ever since, fourteen years, and worked at the trade in this country, and since I came to Clarks Fork I quit the carpenter trade and went to farming.

693 Q. Since you have been at Clarks Fork at any time have you worked at any carpentering business?

A. I worked with the bridge gang, yes.

Q. When did you leave the bridge gang?

A. I left the bridge gang in September, 1897.

Q. Have you worked at that at any time since?

A. No sir, except this winter.

Q. While you were working on the railroad state whether or not you and Jason Edwards rode on the train together.

A. Yes sir, quite often.

Q. State whether or not about December, 1895, you had a conversation with Mr. Edwards relative to the building he had on the land in controversy and as to Mr. White's attitude toward him, and if so state what that conversation was.

A. Yes sir, I had a conversation with Mr. Edwards.

Objected to as incompetent for the reason that Mr. Edwards when on the stand was not asked about this conversation and put upon his guard.

Objection sustained, but the question may be answered.

694 A. On the 24th of December I went home for Christmas, and Mr. Edwards—I happened to go around to Mr. Edwards, he got on the train later than I did. I believe it was at Horse Plains or Thompson, and he commenced to talk about this townsite matter; and Mr. Edwards and me were generally pretty good friends, and he told me that he got into a row with Mr. White about the lots he was building on; and told me Mr. White notified him not to build; but he had no other place, and he was willing to do the right thing with White, was willing to pay him for the lots, or if he could not do any better he could pull out yet. These remarks Mr. Edwards made at that time; that is what Mr. Edwards told me.

Q. State whether or not in the summer of 1897 you had any conversation with Tom March as to the ownership of what has been referred to in this testimony in this case as the March house?

Objected to as leading and tending to show the ownership of property.

Overruled. Contestant excepts.

A. Well, in the latter part of July, 1897, I went over on the Sound on a visit, and when I came home, I believe the train arrived about 11 o'clock, and just at that time I happened to have a chance to go across on the ferry, and Tom March happened to go, and he commenced to inquire about the country where I was and we got into conversation, and I spoke about the townsite and one thing and another, and how things were over on the sound, and how things was here in Clarks Fork; and told me about the townsite here and

said he had just purchased a house from Foreman in the spring, that he took it in work for about fifteen dollars in labor.

Q. State whether or not that is the house that has been referred to here as the March house?

A. It was generally known as the Tom March building, known today in the community as the Tom March house in fact
695 until Tom March committed suicide, it was known in the community as the Tom March house.

Q. At the time you and March went across this ferry together, where, if you can remember, was Reuben Johnson living?

A. Reuben Johnson at that time was living on the south side of the river on his homestead.

Q. When was it Tom March died?

A. Tom March died in January, 1899.

Q. You heard the testimony on Saturday relative to the new barn of Mr. Daugharty?

A. Yes sir.

Q. State whether or not you knew the time at which that barn was constructed?

A. That barn that Mr. Daugharty built was constructed in 1896.

Q. Commenced when?

A. In the spring of 1896 and finished in the fall, quite late in the fall too.

Q. State how you recall that fact, Mr. Foster.

A. I remember, after I quit the road in 1897, Mr. Daugharty had his blacksmithing shop in his little stable down on Mr. Catlow's ground. I went there and seen him work in his shop; it must have been October or November.

Q. You stopped the railroad in what year?

A. In the fall of 1897.

Q. And you said it was the next spring, in 1898?

A. The next spring that shake barn was built.

696 Q. Did you have occasion to go to Daugharty's place in 1898?

A. Yes I traded with Mr. Daugharty in his store; done all my trading with Mr. Daugharty before that time.

Q. Do you remember a small frame building that George Roberts used to sleep in?

A. Yes sir.

Q. Can you state whether or not that building was on the right of way or on the land in controversy?

A. I am pretty sure that the building was not on the land in controversy.

Q. Why do you conclude that it was not on the land in controversy?

A. Well, in the first place, I have stepped over it myself and measured it 200 feet from the center of the track on the west end of the townsite, or on the east end here, east of the depot. I paced it off several times, and found as long as the buildings were there, that there was a space between there and the right of way; it could be easily noticed.

Q. Did you ever make any other observation *on* which could throw light on the subject?

A. Well, I have si-ted through from buildings erected on that land, Mr. Whitcomb's store building erected—Mr. Whitcomb's store building, also from the Foreman building. And I have seen plain that the house was off from the land, because I could look through between them.

Q. Off the right of way?

697 A. Yes sir.

Q. Now that pig pen, was that on the right of way or on the land in controversy?

A. That was a kind of combination shed, used for an ice house, and the pigs was in front. There was kind of a shed for pigs to sleep under, and in the fall after the ice was out, the pigs slept inside. It was an old rotten log shanty. I have been in it.

Q. Was that on the right of way?

A. That was still further towards the right of way than the little house.

Q. Near the railroad track?

A. Where was the railroad—nearer the railroad track than the other buildings.

Q. Where was the other pig pen?

A. There was a little pig pen where Mr. Roberts used to have his hogs in the back end of the fence of the Robert's enclosure. He had a board fence, and on the front towards Mr. Nagel's there is a pig pen where he fed his hogs.

Q. Was that on Nagel's homestead?

A. That was on Nagel's homestead, because they showed me the line there.

Q. Do you remember a chicken house being on this Roberts property?

A. Yes, there was a chicken house there in 1891, and up to 1894.

Q. What became of it?

Objected to.

698 Sustained as not coming within the scope of the inquiry.

Q. Was there any chicken house there between 1895 and 1897?

A. No sir.

Q. Was there ever any chicken house there off the right of way?

A. Not off the right of way; it was on the right of way.

Q. Something has been said about a wood shed used by Roberts. Was that on the right of way or off of it?

A. The wood shed must have been within fifty feet within the line of the land in controversy, on the right of way.

Q. Where do you live with respect to Clarks Fork?

A. I live one mile south of the town.

Q. In going to and from your house do you pass anywhere near the seven lots referred to as being within Johnson's enclosure referred to in the testimony Saturday?

A. Yes sir.

Q. State whether or not you observed that part of the land in controversy prior to November, 1897.

A. In November, 1897, that land was not touched up there. I didn't see anything on there until 1898.

Q. State when the first improvements in question were placed there.

699 A. In the summer of 1898; might have been in the spring for all I know.

Q. But was it prior to 1898?

A. No sir.

Q. Did Johnson do any fencing there before November, 1897?

A. No sir, not that I seen.

Q. Did he do any clearing there?

A. Not that I seen.

Q. Put up his barn there?

A. No sir.

Q. Any lumber laid on there?

A. No sir, that I seen.

Q. Didn't you pass right by there?

A. I went close to his place picking raspberries in 1898, and I didn't notice anything there.

Q. Were these lots in easy observation of the railroad track?

A. They could not help but see them.

Q. If it had been there, would you have not seen it?

A. Why, most assuredly.

Q. Did you come to town generally by the way of the track?

A. Most of the time; very seldom that I took a ferry, unless I had the team or something. I generally walked the bridge and packed things over.

Q. How long have you known John E. White?

A. Ever since I came to Clarks Fork.

Q. Mr. Foster, during the spring of 1896, and November,

700 1897, state whether or not Mr. White got possession of the land between the county road and the enclosure of Mr. Whitcomb's, to which Mr. Whitcomb referred while on the stand?

Objected to as leading and second because it asks for a conclusion, in that it asks the witness to state if White got possession of certain lands.

Objection sustained.

Q. State whether or not since November, 1895, and prior to November, 1897, Mr. White has cultivated any part of the land west of the county road and east of the Whitcomb enclosures, to which Mr. Whitcomb made reference when he was on the stand, on the forty acre tract in question.

Objected to as incompetent, not being within any of the issues submitted.

Overruled. Contestant excepts.

A. Mr. White had been putting fence there I think in 1896, a rail fence, and I know the fence came up to Mr. Whitcomb's garden

fence, and there was a kind of a lane in there, which was closed up on the side towards the river. And also think he had a small potatoe patch in there because I went with him up there once and he wanted to know what I thought of that ground for potatoes.

Q. State whether or not Mr. White has made any clearing west of the county road subsequent to November, 1895, and prior to November, 1897.

Objected to as incompetent, because the character of
701 White's occupancy and improvements is not included in any of the issues submitted.

Objection sustained, but the answer may be taken.

A. Yes, he made a clearing there during that time. I think he commenced in 1896 there, because he asked me about the burning, and I told him it would not burn; it had been pretty wet and was all water soaked.

Q. Do you know Mr. Hasselroth?

A. Yes sir?

Q. State whether or not he lived in Clarks Fork on November 27, 1897.

A. No, Mr. Hasselroth was not living at Clarks Fork in the fall of 1897.

Q. Do you know where he was?

A. At that time he was over on the sound in the latter part of July, some of the children were living in Hope, had a restaurant there in the spring of 1897; I think that was summer or fall, maybe, I heard them say they quit the restaurant.

Q. Do you remember how long his two daughters kept a boarding house in Clarks Fork?

A. Well, they couldn't be there very long. I could not recollect how long they were there. I remember of his biggest daughters being at home in the house, but I could not say whether anybody else was there with them or not, because I saw some of the children in Hope.

Q. *In* November 27, 1895, or about that time state whether
702 or not Mrs. Thibadeau's daughter was living in Clarks Fork.

A. Well, Miss Leah Thibadeau, during that time I know of seeing her in Wallace in 1896 or 1897. I saw her over there then with her sister. Occasionally I saw her back home again, and she stayed with her mother awhile in Clarks Fork.

Q. Was Al Butler living at Clarks Fork in November, 1895?

A. I am pretty sure Mr. Al Butler went to Spokane that fall or summer after the strike.

Q. Has he ever lived there since?

A. Not that I know of.

Q. When was the strike?

A. The strike was in 1894.

Q. Was Jim Butler there in 1895, living there?

A. He was living there I believe in 1895, but he came out from Chicago on a visit, as much as Jim Butler told me. He didn't like it there, and he said he was going back there again. That is what Jim Butler told me.

Q. It has been testified here that a child of Walter Fleming's was born prior to November, 1897, state your best recollections on that subject.

A. No sir, Mr. Walter Fleming's child was born in January, 1898, I think it was January because I met Mr. Fleming in at Beaver Creek bridge and he asked about some information about getting married, wanted to know where he could get his marriage license, and I told him what I knew about it.

703 Q. Do you know the child was not born until January, 1898?

A. Certainly I know.

Q. Do you know when they were married?

A. I think it must have been September. I could not state positively whether it was September or October. It was that fall they got married.

Q. Mr. Foster, are you familiar with the price of lumber and posts about Clarks Fork?

A. Yes sir.

Q. And the cost of building?

A. Yes sir.

Q. And the cost of hardware used in construction?

A. Yes sir.

Q. Are you familiar with the various buildings that were there in November, 1895, and November, 1897?

A. I know most of the buildings that are there.

Q. Have you made an estimate in your own mind as to the value of these various buildings from November, 1895, to November, 1897?

A. Yes, I can make an estimate.

Q. State what in your opinion, would be a fair valuation for the Whitcomb Bros. & Nagel store building in November, 1895.

A. Mr. Whitcomb and Nagel's store is a building probably 24x50, or 24x40, and being a store building, there are no partitions in it, except ceiling in the roof. I could build it in 1895 for about

704 $800. This estimate is the lumber we are buying up there, because the lumber we bought was $8 or $10 for rough lumber and $12 to $15 for planed lumber.

Q. Was it planed or rough?

A. The outside of it was planed and the inside of it rough.

Q. What do you consider was the value of these buildings in November, 1897?

A. In November, 1897, they put quite a bit of work on during that two years. They put the upstairs and fixed up the room, and that ought to be worth $200 or $250.

Q. Then what do you estimate at in October, 1897?

A. Well, I don't believe he put over $200 into the principal building. A thousand dollars I believe I would take the job to build it.

Q. What were the Butler saloon and hotel building worth in November, 1895?

A. The Butler saloon building was a wreck; that was not worth anything. The Butler building was the poorest building that was in Clarks Fork; it was nothing but a shell. During that time I went

through the building and I know the building as well as anybody, but it was fixed up afterwards.

Q. What was it worth in 1895?

A. Not over $200.

Q. What was it worth in 1897?

A. About $500, I would judge.

Q. Do you remember the Jason Edwards residence; what
705 do you consider that was worth in November, 1895?

A. I don't know whether his building was there in 1895, but the first house he built there was about 10x16 feet, and it is not finished; there is no cornice on the house, and I would not figure it at over $75.

Q. What about the value of his buildings in November, 1897?

A. He put on an addition, possibly 12x16, for a kitchen part, and that was not finished; there was no cornice to it but just a roof. I have an idea $125 for the two buildings in 1897.

Q. What do you think that old laundry building belonging to Butler Brothers was worth in November, 1895?

A. That building the Chinaman had lived in there. It is an old rough board building and no partition in it, a regular China house, and no particular value, wasn't over $25, because it was an old house then.

Q. How about the March house; what was that worth in November, 1897?

A. Mr. March put on some work there and fixed it up. The house was only a small house. I believe the house was only 12x16 in the first place, rough lumber, a box house; and I have an idea about $50 is all you could figure on it.

Q. Does that include the addition to it?

A. That includes the addition because the addition could not be very big when I was there.

706 Q. Include the woodshed too?

A. The woodshed if I am right, the woodshed was only boards, rough boards, rough, 12 inch boards.

Q. What was that worth?

A. You couldn't figure it over three or four dollars, because at the time I seen it it wasn't hardly enclosed at all; it was just boards on top.

Q. Is the same—Is that the same house that March told you about?

A. Yes sir, the same house he got from Foreman and moved over there.

Q. What was it he said he paid for it?

A. He told me paid fifteen dollars in labor to Foreman for the house.

Q. Now, the old store which constituted the Hasselroth residence, what was that worth in 1895?

A. That is an old shed building. In 1895 I would figure about $100. It was a rough board building, a box house, high in front and a shed roof running back.

Q. In 1895 or 1897?

A. In 1897, it was very nearly the same, but they fixed it up inside.

Q. What did you put it at in 1897?

A. Well, I have an idea they put on about $50 worth of work and put up a little addition whether a little house or what it was I don't recollect. Put that about $15 in 1897, because they had it fixed up pretty well.

707 Q. What do you consider Whitcomb Brothers' barn worth in November, 1895?

A. That old barn they moved from Butler's lot, logs if I am not mistaken. About $25 or $30. The value couldn't be much for an old log house.

Q. What do you think it was worth in 1897?

A. Less, if anything, because it was getting old.

Q. What do you put it?

A. Say $30.

Q. That house Mrs. Lloyd lived in was worth what in 1895?

A. That is the best house in Clarks Fork. That house was worth about $250. That is a pretty good put up house, the best house in the whole town. It isn't painted and not worth any more now than it was then.

Q. What was it worth in 1897?

A. About the same.

Q. This little Houston house, that part belonged to Whitcomb; what was that worth?

A. The Houston house is only a little box; used to be in 1895 a little box house similar to a stable. It wasn't worth over $25, because it has only one board and some second class shingles over the sides. I was in the house a few times.

Q. What was that addition worth that Houston put there in 1897?

A. The addition wouldn't be worth over the amount the original building was worth because the house has been sold since for $20.

708 Q. How do you know that?

A. I heard so from the man that bought it.

Objected to as incompetent. Sustained.

Q. What did you value that at?

A. About $50 in 1897. It is only a box house.

Q. That old postoffice building belonging to Mr. Nagel; what was that worth in 1895?

A. It was about 12 or 16 feet I guess, the original little office and only a box house at that. About $35.

Q. What was it worth in 1897?

A. In 1895, some of them put an addition on the house and fixed the house up in pretty good shape. I don't know whether Mrs. Thibadeau. They fixed it up and put an addition on it.

Q. What was it worth in 1897?

A. It must have been worth $50 or $60 then. It has been sold since then for $7 or $8.

Q. You remember the residence building of Mr. Whitcomb down south of the railroad?

A. Yes.

Q. What was that worth in 1895, just a residence building?

A. I have an idea Mr. Whitcomb's must be 16 by 26 or 16x28, and there is a little addition on it, a kind of a shed roof on the south side. I would say about $250, because it is only a box house of rough lumber.

Q. What was it worth in 1897?

A. It wasn't worth any more, because the house is not painted.

709 Q. Wasn't there something else added to it after November, 1895?

A. I hardly think so, because the kitchen—it might possibly be, but it seems to me they had a kitchen on there in 1895. I ain't positive whether they built another addition on, but it seems to me the kitchen was on there in 1895.

Q. Then you would make that in 1895?

A. Yes, my idea is about $250.

Q. He had a barn, a chicken house woodshed and other out buildings. What was they worth in 1895?

A. He had a pretty good sized chicken house there. I don't know whether he had a barn or not I don't recollect seeing it but I know the chicken house and woodshed and several out buildings.

Q. What would they be worth?

A. I have an idea they would be worth $75 or $80.

Q. He had some fruit trees there in 1895 on his place. What do you think they were worth about that time?

A. I know Mr. White got quite a lot of fruit trees in there. They wasn't bearing in 1895, I don't believe, I didn't see them bearing but in 1897, some of them bore. It isn't quite an acre. It ought to be worth about $100 in 1895.

Q. How much in 1897?

A. About $150.

Q. Mr. Whitcomb had a fence around there somewhere. What do you think that fence was worth?

710 A. The value of the fence didn't amount to much because it has been—I think, he got a few pickets there; I don't think the value of the fence would amount to more than $25 or $30.

Q. What was that worth in 1895?

A. Well, the fence wasn't worth over $25 then.

Q. Whitcomb Brothers and Nagel had a root cellar up there. What was that worth in 1897?

A. I could not give you any information about that. I never was inside the cellar and don't know what kind of a cellar it is. I was alongside of it but can't tell about it inside.

Q. Was Schindler's house there in 1897?

A. I ain't positive.

Q. What do you suppose that Schindler house was worth when it was built?

A. I think it was a little frame house with rustic on it; if I ain't mistaken, it must be about 14x16, or so, I have an idea it is worth $100.

Q. Was there a fence put up there at the time the building was erected?

A. I don't recollect whether there was a fence in 1897 there or not.
Q. That was a little back from the road wasn't it?
A. It was as I went up to Nagel's mill, and I didn't pay much attention to the fence.
Q. That Fleming house you said that was there?
A. I know Walter Fleming's house was there later in 1897.
Q. What was it worth?
A. Well, that was a box house; about $100.
711 Q. What was that Pete Larson house worth in 1897?
A. In 1897 he told me the house cost him $25.
Q. That was the cost of materials?
A. He said the house cost him $25, and I believe he said he sold it to some one and did not lose anything.
Q. What was his labor worth?
A. He did not say. It was a little house out of rough boards. I think it was a box house, the way he spoke about it.
Q. Have you made an estimate as to what the ordinary fence that is built there would cost per rod?

Objected to because there is difference in fence.
Objection sustained.

Q. What would be the best kind of a fence that was built there ordinarily?
A. A four board fence 1x6, you can build for about forty cents a rod.
Q. State whether or not any of the fence testified to on yesterday are that character of fence?
A. There is some fences around there I think with four boards, around some of the rocks.
Q. The rest of them were how?
A. I guess the majority of them are three and four boards. I believe there are more four boards fences than three boards.
Q. About what would it cost to put up a fence around thirty-five foot front lot by 110?
A. Well, it would cost you about, at $9 a thousand, $7.50
712 that would fence one lot; it takes about $5 to buy the lumber and about—well the posts being right there on the ground, $5.00 would buy the lumber and posts, the whole thing but you can fence two lots for about $9.00.
Q. Does that count in the labor?
A. Yes.
Q. Would that make as good a fence as McWilliams had?
A. I believe the same fence, a four board fence.
Q. As carpenter Wilson had?
A. Well I am not positive whether Mr. Wilson has a four board or a three board fence, but that es-*mi*ate will make a four board fence.
Q. Better than a three board fence?
A. Yes.
Q. Would it make as good a fence as Mr. Hutton had?
A. Well, these fences up here are most are of three and four boards I think.
Q. When was that Hutton fence put there?

DARK PAGE BLEE

A. I could not positively state about that fence. In fact at that
ne don't know that Mr. Hutton claimed the lot.
Q. Would the kind of fence you talked about be as good a fence
J. B. Whitcomb had put on the land?
A. I think Mr. Whitcomb's was a four board fence. I am pretty
re it was the same kind of a fence, yes, Mr. Whitcomb's is a four
board fence.
Q. Do you remember when that fence was put there by
Mr. Whitcomb?
A. That fence was put there the next year after the county road.
Q. That was in 1898?
A. Yes sir.
Q. Not in 1897?
A. No sir.
Q. Would it make as good a fence as Oullet put there?
A. Yes sir.
Q. Would it be as good a fence *sa* Mrs. Lloyd put there?
A. The same thing.
Q. When was Mrs. Lloyd's fence put there?
A. So far as the places are concerned, I don't know—I don't be-
ve I could place them unless I was there, because the fences are
alike, the most of them I believe, with the exception of Mr. Ed-
rds, he has got a picket fence, rough pickets.
Q. You don't remember when Mrs. Lloyd's was put there?
A. I could not remember now. I could not tell the difference
ween those fences or who they belonged to at that time.
Q. What would it cost to clear the McWilliams lots, stated to have
n two lots?
A. Well, the ground where those lots were was pretty much
cleared, because the timber was all burned down I recollect
in 1891 when I came there and there wasn't much rubbish
on there, hardly any. So it could not be such a terrible job
lear up what they did.
Q. What do you think it would cost to clear these McWilliam
?
A. I have an idea it would cost to clean up these lots in good
pe about $15 a lot because on that knoll there wasn't anything
re to speak of.
Q. That would be $30, and to fence the two lots?
A. About $9.50 and to fence the two lots?
Q. How about the Carpenter Wilson lots?
A. I have an idea Mr. Wilson had a harder ground to clear and
as been worse to clear that ground over there and over towards
railroad track.
Q. What would it be worth?
A. That would be worth $25 apiece to clear those lots.
Q. That would be $30, and a board fence around the two lots
ld be $9.60?
A. The fences are all alike that I can recollect of, with the excep-
that there are one or two with three boards, but I could not
r positively about that.
Q. What would it have cost to have cleared the two Hutton lots?

A. I could not positively locate the Hutton lots.

Q. How about the Oullett lots, four of them; what would it cost to clear the land?

A. I could not locate these lots either, I don't know whether they were just beyond Mr. Edwards enclosure or east of that, but
715 they were about the same scope of ground and I would figure about $15 a lot.

Q. Do you remember the George Roberts privy?

A. Yes sir.

Q. What would it have cost to build that?

A. I can build a privy like George Roberts for $15, because I am positive that privy was only four or four and a half by six.

Q. At that March house was there any barn and enclosure around it?

A. I never noticed only that shed I referred to back of the house.

Cross-examination.

By Mr. HEITMAN:

Q. You say you had a talk with Edwards about his building his house on this property. When was that?

A. The 24th of December, 1895.

Q. Where did you see Edwards?

A. On the cars.

Q. Where?

A. Coming down from Missoula. Edwards got on the train at Horse Plains or Thompson; it seems to me it was Horse Plains.

Q. What did Edwards tell you about his controversy with White?

A. Edwards told me that White came over and forbid him putting a building on the land and Edwards felt kind of bad about it.

716 Q. Did he say he had a row with White over it?

A. The way he got to talking about it, he said he had a row with White about building on the land.

Q. He didn't say anybody fought.

A. No sir, he explained afterwards.

Q. Use his language.

A. He says the row he referred to was, he notified him not to build on those lots.

Q. When did he say that White notified him?

A. Mr. Edwards did not state to me when he did notify him. He said he had notified him not to build on it.

Q. He didn't locate the time?

A. He didn't say the time. But he was kind of fixing on the house then; I noticed him working on the house about that time.

Q. You don't remember whether this talk between him and White took place before November, 1895, or not?

A. Oh most assuredly it took place in the fall, because he told me he was going to build before he ever built there.

Q. Did it take place before November, 1895?

A. No sir.

Q. Did White's conversation with Edwards take place before November, 1895?

A. No sir.

Q. When did it take place?

A. It took place in the fall of 1895.

Q. What time in the fall of 1895?

717 A. Some where about September or October.

Q. Was it before November 27, 1895?

A. Mr. Edwards did not state whether it was before or after.

Q. And you are not certain whether the controversy between White and Edwards took place before November 27, 1895 or not?

A. I am not certain whether it was before November or after November, but it was late in the fall.

Q. You are sure Edwards told you it took place late in the fall?

A. Yes, I am sure.

Q. In October?

A. Well, Mr. Edwards did not state any date, or what date he got notified. He didn't use any language that he stated any date at all, but he says lately.

Q. When did Edwards build that home, do you know?

A. I seen the house finished on Christmas. The house was standing there then.

Q. You say in July, 1897, you had a talk with Tom March about this house; where did that talk take place?

A. Talked going over on the ferry.

Q. What time of year was that?

A. The latter part of July.

Q. You say Johnson was living on his ranch at this time?

A. He was living on his ranch, because I am positive at

718 the time March had Johnson's team driving over there.

Q. Tom March was living with Johnson, wasn't he?

A. Well, I don't know he stayed with Johnson very much. He worked with Johnson.

Q. Stayed with him very much?

A. Yes, he stayed there for years on his ranch.

Q. Worked for him too all the time?

A. Worked for him most of the time.

Q. When did you say Daugharty's new barn was built?

A. Well, the barn was built in the summer of 1898, the year after I quit the road.

Q. What time of the year was it built?

A. Well, he might have started the barn in April or May, but I know the barn was not completed until quite late in the fall, the whole building.

Q. Did Daugharty have any stock in the spring of 1898?

A. I think he had a horse. He had some stock, I know.

Q. What kind of stock?

A. He had two horses then, and whether he had a cow I am not positive. I know he had two horses in 1897 down in a little barn on Jack Catlow's ground. I think it was in Jack Catlow's enclosure where he had a little barn.

Q. Down in front of Jack Catlow's place?

A. A little above, towards town.

Q. Did he have a blacksmith shop anywhere?

719 A. Yes sir, and bellows right there.

Q. Right where?

A. Right on the place, on the Catlow's.

Q. When did he build his blacksmith shop?

A. Oh, that is an old one that he had down there.

Q. When did he build his blacksmith shop up here at this new barn?

A. I could not tell you whether he put the blacksmith shop in in 1898 or not, because I seen the bellows down there in the spring of 1898 on the lower place.

Q. You don't know whether he built his blacksmith shop at the new barn in 1898 or not?

A. I don't know, because in the fall he had it enclosed.

Q. This George Roberts residence, where was that situated; with reference to his saloon and hotel?

A. Well, it was back; it was just about between the two buildings, between the hotel building, and there was a little addition put on the other building, and that little house, there was a space between those two buildings, for I walked over there and around there was a little house standing within twelve feet of where the kitchen projected out.

Q. Was it twelve feet in the rear of the saloon?

A. Well, not the saloon; the saloon was not quite as long as the hotel building and the kitchen.

Q. Was it twelve feet in the rear of the hotel?

A. I have an idea in the rear of the kitchen; in the main

720 hotel building and in the rear of th- kitchen.

Q. The kitchen was in the rear of the main hote- building?

A. Yes sir.

Q. It was about twelve feet back of that?

A. That is what I figured on.

Q. How long was that dwelling house of Roberts?

A. The George Roberts saloon.

Q. No, how long was this little residence?

A. Oh, that little residence was about, I have an idea twelve by sixteen. It was a very little narrow house.

Q. Then it was sixteen feet long?

A. Yes.

Q. How long was the George Roberts hotel building?

A. The hotel was the same length as the saloon, and I have an idea the saloon——

Q. No, awhile ago you said it was longer.

A. I think the kitchen was a twenty foot addition on the hotel, and the hotel building itself must have been about 30 to 35 feet.

Q. Then the kitchen was twenty?

A. Twelve feet.

Q. Now, how far was the front of the hotel building from the railroad track?

A. The front of Mr. Roberts' building was just a hundred

feet from the center of the track, because I paced it off several times.

721 Q. How often did you pace it off?

A. Well, I worked over there because we expected to put this in, how far it was on the right of way.

Q. When did you do it?

A. I done it several times, not only once but several times after the survey, after the thing got into controversy.

Q. Did you ever measure it.

A. Not with a rule, but I can measure pretty good without a rule.

Q. Can you measure with your eyes?

A. I can measure with my feet. I can pace off three feet pretty close.

Q. You don't rely on eye measurement, then?

A. Well, that is in cases if I have to.

Q. Was there anything back of George Roberts' residence building in the way of improvements of any kind?

A. Yes, he had some fruit trees there.

Q. How many?

A. Well, there was four rows of fruit trees. I would judge there was about thirty-five trees.

Q. How far back were they of his residence?

A. Some of the trees was close, right close to the residence and extended back on to Nagel's lots.

Q. Extended back from the townsite onto Nagel's homestead?

A. Yes sir, and they are there yet.

Q. What were those trees worth in November, 1895?

722 A. Those trees were worth—he planted them in 1890—about $2 apiece.

Q. How many did you say?

A. Something in the neighborhood of about 25 trees.

Q. How old were they in 1895?

A. I didn't go in there to count the trees on purpose, but I know he had four rows there, and I know when Mr. Roberts got the trees, but I forget the number or how many he did get. I recollect plain when he got the trees.

Q. And you value them at $2 apiece?

A. Yes sir.

Q. Where was this chicken house at George Roberts' residence?

A. The chicken house was in 1894 and I seen them tear down there.

Q. Was there any chicken house there between November, 1895, and November, 1897?

A. No sir.

Q. None at all.

A. None at all.

Q. Was there any chicken house there when Gordon Daugharty built his barn?

A. He might have used that old barn or a log stable for a chicken house for all I know.

Q. Was there any chicken house?

A. Not that I recollect of. The only thing that I recollect was that old barn.

Q. Isn't it a fact Gordon Daugharty tore that old chicken
723 house of George Roberts' down and built his barn on the same site?

A. Not to my knowledge.

Q. You don't know anything about that time?

A. No sir.

Q. About these seven Johnson lots, you say Johnson made no improvements on them before 1898?

A. Not that I seen; I passed there three or four times a week, and I haven't seen anything done; didn't see anything.

Q. How could he have made any improvements there and you not see them?

A. Well, now I went over there in 1898 and I didn't see any improvements; I was over there picking berries in 1898 with my children, and we went right across that point and I never noticed anything then.

Q. What time in 1898 was that?

A. In the summer when raspberries are ripe; about the first of July.

Q. There had been no clearing on this land then?

A. Not that I seen.

Q. Not a fence put up?

A. I didn't see any fence.

Q. No lumber piled up?

A. No sir.

Q. No barn being built?

A. No sir.

Q. A perfect wilderness was it?

A. Well it was small brush and some cottonwoods; they
724 had cut some brush out there on the right of way, in front.

Q. You say Mrs. Thibadeau was living in Wallace in 1897?

A. Miss Lilly Thibadeau was living in Wallace in 1897. In the spring we went over there and I met her in Wallace with her sister.

Q. Visiting her sister?

A. She was there.

Q. Where was her mother there then?

A. She was in the postoffice building in Clarks Fork.

Q. Miss Lilly lives with her mother doesn't she?

A. She used to live with her off and on.

Q. Didn't she always when she got through with her visit with her sister, it was as near to come to Clarks Fork and live with her mother?

A. She would naturally go home to her mother.

Q. When did you say her brother lived at Clarks Fork?

A. To the best of my knowledge, he lived in Clarks Fork in the fall or summer of 1894, or somewhere until after the strike.

Q. You are dead sure of that?

A. I am almost positive.

Q. Where did he go?

A. Well, I spoke to her several times and she said he was gone to Spokane.

Q. Jim Butler you say was at Clarks Fork on a visit?

725 A. That was what he said; he said he came from Chicago on a visit.

Q. How long did he stay there?

A. I think he stayed until 1898 in the spring.

Q. When did he come there?

A. It seems to me he came there in the fall of 1896 or the spring of 1897.

Q. Wasn't there in the fall of 1895, then?

A. I ain't positive; I don't think he was.

Q. When did Butler sell out to Foreman?

A. Butler sold out to Foreman it seems to me—well I could not state the particular day. I seen the Butler house nailed up there quite awhile. I could not state whether it was in 1896 or 1897. I could not tell anything about their transactions. I don't know whether he sold out in 1896 or 1897.

Q. You don't know when the boards were taken down and Foreman moved in?

A. Well, when he fixed his house the first one I noticed Foreman occupied the house, he went to work and moved an old building from below George Roberts up there, and Tom March helped set it alongside of the old Butler building, and they gave it a general overhauling.

Q. You don't know then when Butler sold out to Foreman?

A. I don't know whether it was in 1896 or 1897. I could not state.

Q. It was not in 1895?

A. I could not state positively; I don't think so.

726 Q. It was not in 1894?

A. No sir.

Q. Then you don't know whether it was in 1895 or 1896 or 1897?

A. I could not state positively, because I know the house was vacant for awhile, and I could not say when they made the bargain or anything of the kind.

Q. When did Foreman move in?

A. I know in the summer of 1897 I seen Foreman in there.

Q. Did you see him there before that time?

A. Well, in the summer of 1897, that is the only thing I can recollect. In the spring they moved the house and it was quite muddy there.

Q. You say Jim Butler stayed there from 1895 or 1896, somewhere along there, up till 1898?

A. He left the spring of 1898.

Q. Where did he go?

A. Well, I could not tell you where Jim Butler went to, I heard him say he was going to enlist.

Q. You don't know where he went to?

A. I don't know; he left there.

Q. Didn't Jim Butler leave there when the Butler Brothers did and go with them to Spokane?

A. It have been—it might have been.

Q. You say Jim left there in 1898. You said he stayed t
until 1898 on a visit.

A. I didn't say that I was positive, but I thought he was,
now by jogging my memory, he was not there in the spring of 1
no sir, he was not.

727 Q. Was he there early in the winter of 1898?

A. Well, I would not positively say, because I never
very particular attention to it. I know he was there but I could
say how many months or days he was there. I was not very
acquainted with Jim Butler.

Q. Was he here in the fall of 1897?

A. I could not say.

Q. Was he there in the summer of 1897?

A. I could not say, because Foreman had possession of that bu
ing in the summer of 1897.

Q. Was he there in the spring of 1897?

A. I could not state positively.

Q. Was he there in the early winter of 1897?

A. I am not positive; I could not state. I can't jog my mem
when it was.

Mr. LAMAR: If your Honor pleases, this cross examination is
coming very lengthy, and I shall object to it.

The REGISTER and RECEIVER: He has a right to cross exam
him fully in regard to these matters.

A. (Continuing.) Whether Jim Butler left there in the sp
of 1897 or 1896 or when he did leave there, I could not state.

Q. You don't know whether he left there in 1896 or 1897
1898?

A. I recollect now that he did not live there in 1898; he was
there in 1898. It was in the summer of 1897 he was not there
can't recollect right now.

Q. Then when you stated that he stayed there from
728 time he came until 1898, you were mistaken?

A. Well, I was mistaken in the matter, mistaken in
dates.

Q. Now, Mr. Walter Fleming talked to you about wanting to
married?

A. He was asking my advice.

Q. When was Walter Fleming married?

A. He was married in the fall of 1897.

Q. What time in 1897?

A. After I quit the road; it must have been September or
tober.

Q. When did you say his child was born?

A. In January, 1898.

Q. What time in January?

A. I could not state the date, but I know it was January an
was pretty cold weather

Q. You say you are a carpenter and builder, and you say Whitcomb Bros. & Nagel's store was worth $800 in November, 1895?
A. Yes sir.
Q. That is a correct estimate is it?
A. Well, of course that is a close estimate.
Q. What kind of a foundation did that building have?
A. To build Mr. Whitcomb's building so far as the building is concerned, you can't figure the foundation in the building, because they have a cement cellar under the building and got logs on top of the cement cellar.
Q. Then it is not a stone foundation?
729 A. It is logs and wooden sills. It is a stone foundation and wooden sills on top of the stone foundation as well as I recollect.
Q. What was the character of that stone foundation?
A. Well, the character of the stone foundation, they got rocks up there.
Q. What kind of rocks?
A. They get the stone east of the town and Andrew Jacobson helped him build the cellar there from those rocks.
Q. What kind of rocks are they?
A. Well, they are a kind of rocks we have got around Clarks Fork at the foot of Antelope hills.
Q. Granite or soapstone? I want to know what kind of rocks they are.
A. No, there isn't any granite there. It is a rotten rock, but it is the best rock we can get around there close to the railroad track, a kind of white looking rock.
Q. You say there is a cellar under that building?
A. Yes sir.
Q. How large is that celler?
A. I could not give you any information about the cellar; I never was in there in my life.
Q. What was it you helped Mr. Whitcomb do?
A. I haven't helped Mr. Whitcomb do anything.
A. I have not helped Mr. Whitcomb do anything.
Q. Didn't you say you helped do something in connection with this building?
730 A. No sir, it was Mr. Andrew Jacobs that helped to build the cellar.
Q. You don't know how long that cellar is?
A. I have no idea whether they built the cellar the leng*ht* of the house or not.
Q. Have you ever been in the cellar?
A. No sir.
Q. Do you know how wide the cellar is?
A. No sir.
Q. Then you don't know anything about the cellar?
A. About the cellar I could not tell you anything.
Q. You could not tell what it would cost?
A. No sir, I am no stonemason.

Q. You cannot give any estimate?
A. Not of the cellar.
Q. After the cellar is completed then what is the character of the foundations of the store on which the store building rests?
A. They have got wooden sills.
Q. How many of those sills?
A. They have got sills on each side, on top of the stone.
Q. Does the stone go down to the bottom of the cellar?
A. It surely must; I think it does.
Q. And the wooden sills on top of the stone?
A. Yes sir.
Q. Then how long are these wooden sills?
A. The length of the building.
731 Q. Are they sawed?
A. I could not tell you whether they used sawed sills or hewed sills.
Q. About how many feet of lumber is there in those sills?
A. Well, I believe the sills were six inches thick. I am not positive whether they are six or eight inch sills. I didn't take any memorandum of the sills.
Q. Couldn't they have been twelve inches thick?
A. They might have been twelve inches, but as long as I didn't take any memorandum I couldn't state.
Q. Then you don't know whether they were six inches or twelve inches thick?
A. No sir.
Q. Have you any idea how much lumber there was in those sills?
A. Yes sir, if I knew the size of the sills.
Q. But you don't know the size?
A. I don't know the size of the sills; I don't know whether they are six or twelve inches.
Q. Then you don't know how much lumber was in the sills, and you can't tell what the sills cost, can you?
A. Because I don't know the size of them.
Q. Were there any cross sills?
A. I don't know.
Q. Then you don't know how many feet of lumber there were in the sills under Whitcomb's store building?
732 A. I don't know how many because I don't know the size of the sills.
Q. And you don't know what the lumber cost in those sills?
A. Well, I could figure it out if I knew the size of the sills.
Q. But you say you don't know the size of the sills. Did you estimate the sills in calculating the value of the building?
A. Well, so far as the sills is concerned, the house is built on, I have estimated, you can never estimate on a house unless you figure on the bottom sills.
Q. You did not estimate the cellar there did you either?
A. No sir.
Q. After you leave the sills what the character of the materials out of which this store is built—constructed?

A. It is constructed I believe out of 2 by 6.

Q. How much 2 by 6 lumber is there in that building?

A. Well, if you want the figures, I can figure it up for it; it takes me awhile to figure it.

Q. Well, I would like to have you figure it.

A. I can figure every piece of lumber that there is in the house if you want me to.

Q. Well, all right, give us how much lumber there was in the cross pieces.

A. The sills?

733 Q. No, not the sills.

A. The sidings?

Q. Yes, what was the character of the other lumber in it?

A. They had rough lumber inside and rustic on the outside.

Q. Was it planked straight up and down outside?

A. No sir.

Q. How much rough lumber was there in the building?

A. Well, I must figure that up and take the dimensions of the building.

Q. Wasn't this building sheeted up between the rough lumber and the rustic?

A. Sheeted up between? Not that I remember.

Q. Will you swear it was not?

A. Not that I recollect. I don't know; I could not tell whether it is sheeted up. I seen the building going up, but I didn't notice whether it was sheeted or not sheeted. It seems to me that the rustic was on the outside and the boards on the inside.

Q. What kind of a floor was it?

A. They had a good floor on it.

Q. About how many feet of flooring was in that building?

A. Well, I believe there is about—well the flooring and ceiling—

Q. I want the flooring now.

A. There is about 1000 or 1100 feet of flooring in that house.

734 Q. What was that flooring worth?

A. I presume that flooring was worth to Mr. Whitcomb $15 a thousand.

A. Was there a double or a single floor in that store building?

A. Well, it seems to me they have rough boards underneath or common surfaced lumber underneath.

Q. Do you know that?

A. Well, I ain't positive whether or not they have, but it seems to me—

Q. What would the rough lumber underneath cost?

A. This surfaced lumber didn't cost Mr. Whitcomb over $5 a thousand.

Q. And there would be about 1100 feet of that?

A. No sir, not of the rough lumber.

Q. How much rough lumber?

A. About 960 feet.

Q. What kind of material was in the walls of the building inside?

A. The sills two by six and rustic outside.
Q. How many feet of rustic was in that building
A. There is about 1800 or 1900 feet of rustic in that whole building, including the waste.
Q. How much was that?
A. The ceiling is the same material as the flooring. There is I might say 2200 feet of ceiling, because the upper hall is ceiled and there is floor posts the same as I mentioned on the bottom floor.
Q. That is the hall floor?
735 A. Yes.
Q. What kind of a roof has it?
A. A shingle roof.
Q. Now many shingles?
A. Well there is in the neighborhood of 14000 shingles. I could not give the figures about that.
Q. Was there any paint on this building?
A. Yes, there is paint on it.
Q. A good coat of paint?
A. Well, there is some pretty good paint on there.
Q. It is a painted building, and not merely primed?
A. No sir, it is a painted building.
Q. Doors and windows in it?
A. Yes sir, and a store front.
Q. Glass is it?
A. Yes sir.
Q. Any shelving?
A. The shelving don't belong to the store.
Q. It is there, isn't it?
A. Well, the estimate on the house don't include shelving.
Q. Is that shelving fastened to the house?
A. Not that I could see, because it is shelving for dry goods and groceries and one thing and another.
Q. You don't know whether the shelving is fastened to the house or not?
A. Well, it stands in there.

Whereupon a recess was taken until tomorrow morning, April 1st, 1902 at 9:15 o'clock.

736 APRIL 1, 1892—9 15 a. m.

Hearing resumed.
Present the same parties as yesterday.

JOSEPH B. FOSTER.

Cross-examination continued.

By Mr. HEITMAN:

Q. You said that the Lloyds house was worth $250, and that it was a painted house. How large is that house?
A. The Lloyds house is not painted.
Q. You say it is not painted?

. It is not painted at all.
. How large is the Lloyds house?
. I should judge about 16x28.
What kind of material was used in its construction?
It is 4x12 planks sawed.
How was it finished inside?
I could not tell you the inside of the house; I never was inside
e house in my life.
Then you just estimated its value from what you saw from
utside?
Yes sir.
Is it one or two stories?
It is one story.
I wish you would describe that Lloyd house a little more par-
rly?
It is a house put up from 4x12 planks and shingles on the
outside over these planks, and as far as the fixtures inside is
concerned it is the common fixture; there is no fancy blocks
on the windows or anything; just common doors and win-
the same as in any common house.
Do you know what kind of a foundation it has?
It has the same foundation; it has no stone foundation.
Do you know whether the mud-sills or sleepers or ground sills
ed or sawed?
Well, I seen them put them in there, but I could not recollect.
Are you certain it is a one story house?
That is all you can call it, only one story house.
How many doors are there in it?
Three.
How many windows?
I think there are four windows in it and a half-window up
n the gable.
Small window?
Yes sir, common size window probably—well, I could not state
ly, but they are coamon sized windows.
You value the postoffice building where Mrs. Thibadeau lived
in 1895 and $50 to $60 in 1897. *Q.* How large is that
g.
The original building in 1895 was about 12x16, but since that
was an addition put on after 1895 for Mrs. Thibadeau to
live in.
Q. What part of the building was used as a postoffice?
A. The old building.
nd the addition was Mrs. Thibadeau's living rooms?
itchen.
st the kitchen?
itchen.
a front room?
he had a little front room where she had the postoffice, a
om.
ow large was that small room?

A. Well, the room might have been ten feet wide; hardly that much.

Q. She did not use the room for any purpose.

A. Just for a little sitting room.

Q. And to walk into the postoffice?

A. Yes, the sitting room; the postoffice was on the south end of the sitting room.

Q. Then she just had a little sitting room and kitchen built on as an addition?

A. The kitchen was on behind the sitting room.

Q. How large was this sitting room and kitchen combined?

Mr. GRAHAM: If your honor please, he described both of these buildings, and it is a simple matter of calculation as to how large they were. It is encumbering the record at our expense, and we object to it.

The REGISTER and RECEIVER: Well, there is a big discrepancy between his figures and the other figures, and I would like to have some light on it.

739 Q. Of what was this sitting room and kitchen combined constructed of?

A. Rough lumber.

Q. How was it covered?

A. It was shingled on the main building. It seems to me there were shingles on the addition, but I could not state positively.

Q. What kind of floor had it?

A. The old floor that used to be in the house, if I am right, was 1x6 flooring.

Q. Any rustic on the outside?

A. No sir.

Q. Any ceiling on the inside?

A. It seems to me they had lining on the inside.

Q. Were you ever in this sitting room?

A. Yes, lots of times.

Q. Any paint on the house?

A. Not as I recollect.

Q. If there was you don't remember it?

A. Well, they might have had the door casings painted.

Q. You say that Mr. Hasselroth and family were not living in Clarks Fork between November, 1895, and November, 1897?

A. They were living there in 1895 but not in 1897.

Q. None of them in November, 1897?

A. No sir.

Q. Any number of the family there then?

A. No sir, not that I recollect.

740 Q. Who was living in their house in November, 1897?

A. That house, to the best of my recollection, was vacant in November, 1897.

Q. Miss Lena Thibadeau was living there, you say, in November, 1897?

A. She was staying there off and on once in a while with her mother.

Q. But you say she was in Wallace in 1897?

A. Yes sir.

Q. In November, 1897.

A. No sir, not in November, in the spring.

Q. Where was she in November, 1897?

A. She was in Clarks Fork that I remember.

Q. Her mother was living there all the time?

A. Yes sir.

Q. Have you any interest in this case, Mr. Foster?

A. No sir.

Q. You and Mr. White are very warm friends?

A. Not any warmer than anybody else.

Q. Mr. White owes you some money?

A. Well, that is my own proposition.

Objected to as not proper cross examination.

Sustained. Contestant excepts.

Q. What kind of a fence was around Carpenter Wilson's lots in November, 1897?

A. I could not state whether he had a fence there at all; it has slipped my memory whether Mr. Wilson had a fence in 1897, but it seems to me he did have a fence there.

741 Q. Didn't you say yesterday it was either a three or a four board fence?

A. Yes sir, it was a three or four board fence on the lots.

Q. Then it was either a three or a four board fence?

A. I think it was a four board fence.

Redirect examination:

Q. Mr. Foster, in estimating the value of the Whitcomb Bros. & Nagel store on yesterday you did not take into consideration whatever value there may be to the cemented cellar.

A. No sir.

Q. Nor to the shelves in the store?

A. No sir.

Q. Nor the counters?

A. No sir.

Q. Nor the show-cases?

A. No sir.

Q. As I understand it you do not claim to be an expert on the value of such things?

A. I can figure up any kind of building up to $10,000. If I take any time, so far as figuring is concerned, because I have built such buildings on my own account.

Q. That is the wood-work?

A. Yes sir, the wood-work.

Q. Mr. Foster, the idea has been given on the record that Mr. White is in your debt. As a matter of fact, how much does White owe you today?

742 A. Mr. White owes me probably fifty dollars.

Q. How much of that is borrowed money.

A. Fifty dollars.

Q. The rest of it is for what?

A. The rest of it is for vegetables and garden stuff and such like.

Q. Would the fact that he owes you forty or fifty dollars have any effect upon your testimony here?

A. Not a particle.

Q. I suppose there has existed for some time these business relations between you and Mr. White?

A. Yes sir.

Q. Sometimes it is on one side of the account, and sometimes on the other.

A. Yes sir.

Q. In testifying about what Mr. Heitman called the Lloyd building did you have in mind the Vinton building?

A. Yes sir; that is the old original Vinton building.

Recross examination:

Q. Now you say in estimating the value of the Whitcomb store at $800 you did not consider the cellar, the shelving, counters or show cases. Did you consider the cost of construction?

A. Yes sir.

Q. In your opinion as an expert, what would be the cost of constructing a building of that kind, just the cost of construction alone?

A. The way the building is there today——

743 Mr. GRAHAM: In 1895 to 1897.

A. Well, the estimate I have given in 1895, because the upstairs was not fixed up.

Q. Well, you put it at $800 in 1895 and $1000 in 1897?

A. Yes sir.

Q. Actual cost of construction?

A. Actual cost of construction: the exact cost of construction material.

Q. No, just construction alone?

A. I misunderstood. The construction of building of that——

Mr. GRAHAM: I suppose you mean the labor.

Mr. HEITMAN: Certainly; he is an expert.

A. Well, I am no expert: I am no architect. The construction of that building 24x50 with two sheds, one used for an oil house and the other for a warehouse, would amount to about $300, the way it was in 1895.

Q. What did carpenters get for a day's work in Clarks Fork in 1895?

A. Mr. Whitcomb paid $2.50 a day, as much as I understood.

Q. How long would it take one carpenter to have completed that store building as it was in 1895?

A. Well, it is impossible almost for one carpenter to build a building of that kind.

Q. How long would it take three carpenters to complete it?

A. Three carpenters can go to work and build that build-
744 ing, ought to be able to build that building in thirty days.

(Redirect:)

Q. Were those buildings actually completed in 1895?
A. No sir.
Excused.

GEORGE ROBERTS, sworn on behalf of Contestee.

Direct examination.

By Mr. LAMAR:

Q. Are you the same George Roberts who testified at the previous hearing in this case?
A. Yes sir.
Q. Are you the same Roberts that owned certain store buildings located on the right of way in Clark's Fork previous to April 5th, 1897?
A. Yes sir, I owned a saloon, hotel and store building.
Q. Did you hold possession of that property on the right of way?
A. I had a lease from the railroad company.
Q. What did you do with that lease?
A. When I sold the property I turned the lease over to Gordon Daugharty.
Q. Mr. Roberts, will you look at that instrumen-, marked contestant's Exhibit B, supplemental hearing, and state whether or not that is the instrument passing between you and Mr. Daugharty.
A. Yes sir, that is the instrument that was drawn up and attached here is a letter that I wrote to Mr. White to finish up the settlement.

745 Q. Who drew that instrument?

A. Mr. Owen, I think.

Q. Did it relate to or cover any property off the right of way?
A. Not at all, only the saloon and buildings and goods that were on the right of way.
Q. Did it include your store account?
A. Yes sir.
Q. And furnishings?
A. And furniture.
Q. And stock of goods on hand?
A. And stock of goods on hand——

Objected to as leading; the instrument being in evidence and introduced, speaks for itself.
Objection sustained.

Q. Mr. Roberts, how much money was ever paid you by Mr. Daugharty in pursuance of that agreement?
A. Eighteen hundred dollars.
Q. And one thousand dollars down, was it?

A. A thousand dollars down.

Q. And the balance was afterwards compromised?

A. Afterwards compromised; Mr. White collected the $800.

Q. This $800 compromise was subsequent to this transaction some time.

A. Yes sir, it was about three months afterward, I guess, or something like that.

Q. Before making this contract with Daugharty, did you confer with Mr. White on the subject at all?

746 A. No, I did not know I was going to sell out until I had sold.

Q. About how much in value of groceries and merchandise was in these buildings at the time of the sale?

A. From fifteen hundred dollars to seventeen hundred dollars, I should judge.

Q. The furniture in the hotel building and restaurant consisted of what. First, how many chairs did you have?

A. The chairs that I had in there, the majority of them I had in there cost me $50 a dozen.

Q. About how many of that class of chairs?

A. There was about $75 worth of chairs.

Q. Of that class?

A. Well, there was a dozen of one kind and another dozen of another kind, that I thought was about $75.

Q. What if any tables did you have and their value and cost?

A. Two tables, that cost $23 apiece in Spokane.

Q. What if any heating apparatus did you have in the kitchen?

A. I had a range that cost $75 if I remember right.

Q. What was a fair value of the other kitchen fixtures at that time?

A. About fifteen dollars.

Q. What, if any fixtures did you have, and the value?

747 A. One hundred and fifty dollars.

Q. State whether or not you had any musical instruments?

A. I had a piano.

Q. What was its value?

A. Two hundred dollars.

Q. What did it cost originally?

A. Worth $500 originally.

Q. How many bed rooms did you have?

A. Twelve bed rooms.

Q. What did the furniture average in value?

A. It was worth about $40, the furniture and dressings.

Q. Were the rooms as a rule carpeted.

A. I rather think the rooms were all carpeted.

Q. And the bed room sets themselves cost how much?

A. They would average $25 a set for the three pieces, and that did not include the springs, mattresses and pillows.

Q. Was the little house in which you slept furnished and if so what was the value of the furniture in that?

A. It was a little house that the cook generally slept in. The furniture was probably worth forty or fifty dollars; it was carpeted.

Q. The bill of sale seems to carry book accounts. What did that amount to at that time?

A. About three thousand dollars.

Q. State whether or not Jason Edwards' name was on that
748 account and if so for how much?

Objected to as immaterial and irrelevant.

Sustained.

Q. What was the condition of the saloon, hotel and store buildings at that time?

A. Why they began to get pretty old.

Q. What did you consider would have been a fair valuation for that at that time?

A. All of it included?

Q. No, the hotel, saloon and store buildings?

A. About $1200 I thought; fourteen hundred dollars including the warehouse.

(Cross:)

Q. That was at the time of the sale?

A. Yes.

Q. What was the value in 1895, November 27th?

A. Probably worth a little more then.

Q. Were all those buildings, the hotel, saloon, store and ware house wholly on the right of way?

A. Wholly on the right of way.

Q. There was a little ice house located there. State where it was located?

A. It was located out behind my store room.

Q. Was it on or off the right of way?

A. On the right of way.

Q. What did that house cost?

A. Ten or twelve dollars.

Q. I refer to the log house placed there by Kelly and Brodock?

A. Yes sir, that is what I used for an ice house.

Q. You did not build that?

749 A. No.

Q. You don't know of your own knowledge what it actually cost?

A. No, I bought it of Kelly and used it for an ice house.

Q. But you valued it at what?

A. Ten or twelve dollars.

Q. Now, the little frame in which you say the cook slept what was the fair valuation of that?

A. About sixty dollars.

Q. Did you build that?

A. Yes, I had it built.

Q. Will you state, Mr. Roberts, whether or not any part of this building was on the right of way, and if not how you know it?

A. No sir, there was not a bit of it off the right of way; it was entirely off the right of way.

Q. Did you ever make any measurements to ascertain this fact?

A. I did, after we went back from the hearing down here, to satisfy myself again, I took a ten-foot pole and measured it exact.

Q. Measured it from where?

A. From the middle if the railroad track.

Q. The north end of it was less than 200 feet from the center of the railroad track?

A. Yes sir.

Objected to as leading. Sustained.

Q. Do you recollect the distance of the north end of the house?

750 A. Yes, I think I can pretty close.

Q. About how much?

A. The north end of the house was about 192 feet from the middle of the track.

Q. Something has been said here about a rear pig pen. Can you state where that was located?

A. That was on Mr. Nagel's place.

Q. Mr. Nagel's homestead?

A. Yes sir. It was in the northeast corner of my yard, but it was on Mr. Nagel's homestead.

Q. There has been something said about some pumps. Where was located the pump generally used in connection with your business?

A. On the right of way at the kitchen door.

Q. State whether or not there was any other pump constructed by you while there and if so where was it?

A. There was a force pump for fire protection purposes about ten feet from the Northwest corner of that little house about two feet over onto this ground in controversy.

Q. Why did you put it that distance from the house?

A. In case of fire that the heat of the building would not interfere with working it.

Q. State whether or not any other building was constructed by you off the right of way and if so what?

A. There was a water closet.

Q. What did that cost to construct?

751 A. It cost me about $25.

Q. When was that water closet constructed that you recall?

A. It was constructed about 1895, I should think.

Q. When was the pump placed there?

A. It was put in about 1896.

Q. State whether or not you know of White's claim to the land at that time?

A. Yes sir, I did. He talked of it every day.

Q. Did you ever lay any claim to the land back of your property by reason of improvements placed there by you?

A. No sir, never did.

Objected to as immaterial, irrelevant and incompetent and as not being embraced in any issue submitted to be investigated at this hearing; and for the further reason that this witness testified on the former trial, when this whole question was gone into.

Objection sustained.

Q. Mr. Roberts, in a sworn statement of record, Mr. Jason Edwards said, "George Roberts showed me a contract he (Roberts) had with John E. White, whereby White was to deed to Roberts all the town lots he would need for his buildings in Clarks Fork and that he (White) was bound not to sell to any other parties any town lots to build any hotel or saloon upon anywhere near the depot and for consideration he, Roberts, was to do everything in his power to help White win the townsite." Did you ever make any such state-
752 ment in the presence of Mr. Edwards or anybody else?

A. No sir, nor anybody else.

Q. As a matter of fact was there ever any such a contract?

A. There never was any contract and never talked it.

Q. Either oral or written?

A. No sir.

Q. Or any such understanding?

A. Never was.

Q. Direct or indirect?

A. No sir.

Q. In an affidavit of record here, to which the statement is made under oath by Ruben Johnson, to the effect that he fully knew the contents of a certain other affidavit and to his certain knowledge knew the same to be true, occurs the following language: "J. S. Foreman, being first duly sworn, deposes and says: 'That in the spring of 1896 George Roberts wanted to sell him his site, saloon and hotel in the town of Clarks Fork and he told me in the presence of R. Johnson that if he would buy him out he would turn over to him the contract he had with John E. White whereby White agreed to deed to him, Roberts, all the town lots he would need for his buildings in Clarks Fork, and that he, White, had bound himself not to sell any town lots to any other to build a hotel on or saloon upon anywhere near the depot and for this consideration he, Roberts, was to do all in his power to help White to win the townsite.'"
753 Did you ever tell Mr. Foreman anything of that kind?

A. No sir.

Q. Did you ever state, in the presence of Foreman or Johnson or anyone else that you had such a contract with Mr. White?

A. I never stated it. I never had it. Never stated it to anybody.

Q. As a matter of fact you never had such a contract?

A. I never had such a contract, verbal or written and he never told me he would do anything of the kind either.

Q. State whether or not you ever had a conversation with Reuben Johnson relative to [illegible] report that you were dead?

Objected to as intended to rebut Mr. Johnson or contradict him and he was not asked anything about the conversation and was not upon his guard.

Mr. LAMAR: We propose to show that these affidavits on which this hearing was ordered relative to claiming that there was a written contract of Roberts, was made at the time when these parties believed that Mr. Roberts was dead and as showing that this whole matter was brought about in bad faith and we submit that it is a matter about which the department should have information.

Objection overruled. Contestant excepts.

A. Yes sir, I did at the conversation in the fall of 1890, in Cœur d'Alene.

754 Q. In 1890.

A. Wasn't that the time of the conversation?

Q. How many years ago?

A. Two years ago.

Q. You mean 1900?

A. Yes, 1900.

Q. What if anything did Ruben Johnson say to you on that occasion?

A. Why he was surprised. Said it was supposed I was dead, died at Skagway; said it was reported generally in the papers and all around, that I was dead.

Q. And he was surprised to see you in 1900?

A. Yes.

Q. About what time was it when you went to Klondike?

A. I went to Klondike—I left Seattle on the 10th of August, 1897.

Q. That was just subsequent to the time you received this $800 from Dougharty?

A. Yes I went away afterwards.

Q. Mr. Roberts, will you look at contestant's exhibit "A" supplemental hearing and state whether or not you have ever seen this before?

A. Yes I have, I received that. It was sent as registered matter and I received it from the postoffice in Harrison.

Q. What did you do with it?

A. I immediately enclosed it in another letter and sent it to Mr. White.

755 Q. Within the last two months will you state whether or not you have received any other communications of that character and if so what?

A. Yes sir I have received two or three letters threatening letters, with no name signed to them, just stating to keep away from their trouble and not mix up with White any more and to look out for myself.

Q. What did you do with these?

A. I burned them up.

Q. And this is the only one you have?

A. This is the only letter.

Q. State whether or not between November 25th, 1895, and the time you left Clarks Fork, about April, 1897, you ever heard John E. White talk with Ruben Johnson of Clarks Fork relative to White's claim to the land or to any proposed building of Ruben Johnson on the land?

Objected to as incompetent for the reason that Mr. Johnson when on the witness stand was not asked about this alleged conversation and given an opportunity to explain it if there was one.

Objection sustained, but answer not excluded.

Contestee and Contestant except.

A. Yes sir. I have had conversations on several occasions pertaining to that. I can't say what month it was, but it was before Ruben Johnson ever moved over to Clarks Fork and he said he had a notion to come over and build and White says, "If you come over there and build I will claim your improvements if you build on my ground." Johnson said he had a brother in Washington that he had written to and found out that he could go ahead and build.

Q. Where did you say his brother was in Washington, in what employ?

A. In the employ of the government.

Q. Have you any relative or relatives interested in the outcome this townsite, if so who?

A. My sister.

Q. State whether or not she is your sister?

A. She is my own sister.

Q. What is her name?

A. Her name is Mrs. Edwards.

Q. State whether or not she is the wife of Jason Edwards?

A. She is the wife of Jason Edwards, so far as I know.

Q. Now, as to those few improvements you had extended back the rear of your buildings, state whether or not you ever talked Mr. White about his claim of the property off the right of way?

A. I told him I didn't claim anything——

Objected to as indefinite; it may have been 1891 or 1892. I would like to have it brought within the limits of the inquiry and further object on the ground that there is no showing here subject to your honor as to White's claim to this property. We all know what it is. There is no showing here as to his claim or as to occupancy.

Objection sustained. Contestee excepts.

Mr. HEITMAN: I move to strike out the answer of the witness.

Motion sustained.

Contestee excepts to excluding the answer.

Q. Mr. Roberts, subsequent to November 27th, 1895, and prior the time you left Clarks Fork in April, 1897, state whether or you ever acknowledged to White the rights which he was claiming under the homestead law to land off the right of way?

Objected to as immaterial and irrelevant, for the following reasons: First, that on question as to the character of White's claim the land is included in any of these issues, as the department roughly understands the character of White's claim; second the admission of this testimony as to White's claim could not binding upon the contestant in this case and it could not be ding upon the court.

Mr. LAMAR: Counsel for final entryman, while admitting that unsel for contestant has not made out any case of acquiescense inst White, yet it is contended that the final entryman is entitled

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to testimony of those alleged to have had claims adverse to White as to what were the character of their claims of occupancy.

Objection overruled. Contestant excepts.

A. Yes I told him he had the best title to it I thought.

Q. As a matter of fact, Mr. Roberts, since the government survey of this land in 1883 have you ever made any claim to
758 any land as against White off the right of way?

A. No sir, I told White I did not.

Cross-examination.

Mr. HEITMAN:

Q. State your name, residence and occupation?

Objected to as not cross examination and as having been answered.

Overruled. Contestee excepts.

A. My name is George Roberts, residence Harrison, Idaho, occupation saloon keeper.

Q. What was the amount of cash you say Gordon Daugharty paid you for your property in Clarks Fork in April, 1897?

A. He paid me $800 at the time. It was all together $1800 that Gordon paid me.

Q. That was the total purchase price of all the property you sold him?

A. On the compromise: I sold it to him for $3,000.

Q. Then there was a compromise.

A. Yes sir, to get the money right away, to get the $800. I wanted to go to Alaska.

Q. You sold him merchandise and furniture and a piano?

A. Yes sir.

Q. And twelve bedroom sets and saloon building, the store building, the hotel building warehouse, a little sleeping room or residence, pump, orchard, tents, water closet, owned by you at Clark's
759 Fork in April, 1897?

A. I sold out everything that I had that I knew of in Clarks Fork at the time.

Q. Did you sell him a fence enclosing your buildings?

Objected to because the instrument itself is the best evidence of what he sold.

Overruled. Contestee excepts.

A. There was nothing mentioned about trees or fence but I sold him everything I had there.

Q. Did you sell him the fence.

Same objection, same ruling, same exception.

A. We didn't mention anything about the fence, but I sold everything I had there.

Q. Did you give him the fence?

Same objection, same ruling and exception.

A. I sold everything I had. If I owned the fence I sold it to him.
Q. Didn't you claim the fence.
A. Yes, I claimed the fence.
Q. Did you sell him the orchard?
A. There was no mention made of it at all.
Q. Did you claim the orchard?
A. I claimed the orchard because I planted it, yes.
Q. And you sold him everything you claimed there?
A. Sold him everything I claimed.

Mr. LAMAR: We ask that our objection go to all these questions.

760 Q. What was the merchandise worth that you sold to him?
A. From fifteen hundred dollars to seventeen hundred dollars I should judge.
Q. What was the furniture that you owned and sold him worth?
A. I calculated the bed room sets all told were worth about $40 a room.
Q. What were the carpets in those rooms worth?
A. I included them; everything in the rooms.
Q. What was the saloon furniture worth?
A. One hundred and forty dollars.
Q. Any furniture in the store?
A. No sir, not that I could think of.
Q. Any stoves?
A. The stoves went with the stock.
Q. What was the piano worth?
A. Worth $200.
Q. What were the book accounts worth?
A. I had about $3,000 on the books. I would not say how much it was worth.
Q. Can't you give an idea of what they were worth?
A. Well, there was one account of Edwards' for $30.00. I would not count that as being worth very much and there was some other accounts that were all right.
Q. About how much of those three thousand dollars in book accounts was collectable?
761 A. Oh, there was six or seven hundred dollars collectable.
Q. What were the buildings worth?
A. I counted the buildings about $1400.
Q. This hotel, saloon and store, they were all together, I believe?
A. Yes.
Q. What was the little sleeping room or residence worth?
A. Sixty dollars.
Q. And the privy $25 I believe you said?
A. Yes sir.
Q. And the ice house $10 or $12?
A. Yes sir.
Q. What was the fence worth?
A. Oh, the fence was not worth anything to speak of. It was old boards that I nailed up around to keep fellows from stealing my stuff.

Q. What was the pump worth?
A. The pump was worth about $8 or $10.
Q. What was the orchard worth?
A. That I could put no valuation on. I got most of the trees given to me from the nursery for getting an agent out there for them.
Q. How many were there when you sold it?
A. I guess there must have been about 25.
Q. How old were they?
A. It was claimed they were three years old when they were shipped to me and they were planted about three years.
Q. Were they all bearing at that time?
762 A. There was one or two that were bearing, yes.
Q. You say your store building was worth about $1400?
A. Yes sir.
Q. Were they less or more than Whitcomb Brothers & Nagel's store building?
A. Well, I am not any carpenter and I can't tell.
Q. You can make a comparison?
A. No sir, I can't.
Q. You say you had no conversation with Edwards relative to any contract with White?
A. No, I never spoke to him about any contract with White.
Q. What sort of a man is Edwards?

Objected to as immaterial. Sustained. Contestant excepts.

Q. What sort of a man is J. S. Foreman?

Objected to as immaterial and irrelevant. Sustained. Contestant excepts.
Mr. HEITMAN: I will take the answer.

A. I don't know very much about Mr. Foreman. He lived across the river from me and I would just see him once a week. I was not very well acquainted with him.
Q. A man who bore a good reput-tion in the community, was he not?

Objected to as immaterial and irrelevant; he has not been a witness here.

Objection sustained. Contestee excepts.
763 Mr. HEITMAN: I would like to have the answer go down.
Mr. GRAHAM: We ask that the answer be not taken down. The man has not been a witness here.
Motion sustained that the evidence be excluded.
Contestant excepts.

Q. You say you never had any contract either verbal or written with White about the entry of this land in controversy?
A. No sir.
Q. Or about your possessions there?
A. No sir.
Q. As a matter of fact, Mr. Roberts, if you and White had entered

into a contract of that character, that is a contract whereby you were to help him out with evidence in any way you could in the fight to win this townsite and his homestead, you would not admit it?

Mr. LAMAR: We object to the character of the aspersion that is involved in the question propounded by counsel and ask that he be directed in this question to make a different character of references.

Overruled. Contestee excepts.

Question read.

Mr. LAMAR: We object further on the ground that the question is purely hypothetical.

Objection overruled. Contestee excepts.

A. I would admit it, but I have nothing of the kind to admit. I would admit it if he had, because it is nothing more to me than those other people today. I will never live there and don't
764 expect a cent out of this.

Q. You took no side then in this controversy?

A. No sir, I was friendly towards White and was called as a witness for him, but I would be a witness for the other side equally as well.

Q. You say you are friendly to both sides?

A. Well, I am on better terms with White, but I have nothing against any of them.

Q. Never took any interest in this fight?

A. Well, I must say I used to be pretty well interested in it. I was brought down here as a witness, and the like of that.

Q. You took very strong ground in favor of White, did you not from the start?

A. Well I don't know how I started, but I really thought White had the best right to the ground.

Q. And you were willing to do more than merely testify in order to help White's cause, were you not?

A. No sir, I would not advance any money or any thing like that on it.

Q. Did you not when the townsite was surveyed prevent the surveyor who was surveying for the townsite people from surveying the ground upon which you had your improvements?

A. Yes, I did stop him; they were climbing over the back fence to get through this yard and I did tell them to keep out of there.

Q. Why did you do this?

A. I thought they had no business coming over a fence
765 like that into my place. They could come in through the door. I had a high fence.

Q. You knew what they were there for?

A. Yes sir.

Q. They were not injuring your fence by climbing it, were they?

Mr. GRAHAM: To what portion of the examination is this addressed?

Mr. HEITMAN: I am trying to test the interest of this witness.

Mr. LAMAR: We move that that testimony of this kind be charged

to the contestant, as he is manifestly being made the witness of t
contestant, relating to something not brought out in direct exami
tion.

Overruled. Contestant excepts.

A. No.

Q. Then why did you object to that surveyor making the sur
of this townsite?

A. I didn't want no townsite.

Q. You didn't want any townsite?

A. No, I was pretty well satisfied where I was.

Q. And because you did not want any townsite, you didn't w
your neighbors to have one either?

A. I did not want them to have it at my expense, to run a l
through my place. They could meander around.

Q. You wanted them to go back of your orchard on to John
glo's homestead didn't you?

A. I had no objections if they had none.

Q. But you did not want them to go around on your
closure?

766 A. No sir I stopped them from going over the fence.

Q. Were you claiming that land?

A. I claimed as far back as they were going; I was right on
near the line.

Q. Then you were claiming it and not John E White?

A. No, this is on the right of way where they were running
line.

Q. Didn't you just say you objected to their going on your orch
or on any of your possessions?

A. Probably I would object to their going through the orch
but they were not going through the orchard at this time.

Q. Were they surveying the right of way?

A. They didn't look like surveyors; there was Carp Wilson a
another fellow that was climbing over the fence.

Q. Wasn't there another surveyor there?

A. I knew Ashley was in town, but I did not see him going o
the fence.

Q. Then when you stated that you prevented the people who w
making this townsite survey from going across your fence and y
possessions, you were mistaken about their making a survey w
you?

A. Oh, no, I understood very well that they were out surveyi
I didn't see any instrument that I know of, but I knew Ashley.

Q. If they were not surveying the right of way, and y
767 were not claiming the ground, why did you object to th
making survey of it?

A. Just the same as I would object to have a man come throu
my place up to Harrison. I have no title to that ground, bu
would object to have a man go through my yard if I had not s
fit to let him go through, although I don't own the land.

Q. You claim the right to possession of it.

A. Yes, I claim the possession of it.

Q. But in this particular instance you admit that White had the best title to this land?

A. Well, I told White that was my opinion. I am not an authority on law, but I just told him that was my opinion.

Q. Now, Mr. Roberts, if this was White's land and you were making no claim to it, will you please tell us why you were trying to prevent this townsite survey?

A. Well, I don't want to run any line through the back end of my yard, as I thought it was. It was on the right of way, but I didn't want them to run a line through there, and that is the reason I stopped them.

Q. Were they trying to survey the right of way?

Mr. GRAHAM: The witness testified five or six times that they were crawling over his fence within the limits of the right of way, and nowhere else. What is the use of encumbering the record?

A. I had a lease, and they were infringing on my rights at that time. I will state that they were coming over on the ground
768 that I had leased from the right of way, and I considered they were infringing on my rights.

Q. Did they attempt to survey your orchard?

A. Well, I saw them later on, they made the meander around. I guess they must have got the line all right.

Q. They made a meander around?

A. Yes.

Q. You did not allow them to go on the orchard?

A. No, they never asked me to go on the orchard.

Q. You object to their going on any part of the ground of which you were in possession?

A. They never asked me for any privileges at all, and never asked whether they could go through the orchard or not. The only break was this place where they wanted to run a line on my ground, where I had it already leased from the railroad company, and I objected to that, and it went no further. They said all right, if you don't want us to do that, we will survey it anyhow. And so they did. I didn't care what they surveyed.

Q. But you objected to their going on the land you were in possession of?

A. Yes sir, I did, that I had leased.

Q. Or any other part of your ground?

A. They never tried to go on any other part of the ground.

Q. You objected to it didn't you?

A. I might have objected to it, but they never asked me, and never tried to.

769 Q. As a matter of fact, you would have objected to their going onto any part of your ground of which you were in possession?

Objected to. Sustained.

Mr. GRAHAM: I ask that that line of cross examination be stopped or else they pay for it if they go on.

Motion denied.

Q. Now, Mr. Roberts, you say you have no unusual interest in this controversy in behalf of White?

Objected to as not being a correct statement of what the witness said.

Overruled. But in this ruling it is to be understood that the witness did not make the statement as seems to be purported from the question asked by counsel, but the answer may be given.

Contestee excepts.

A. I have taken quite a little interest in it. That is I have been brought down here, I came away from my place of business and the like of that.

Q. In an affidavit made by you on August 5th, 1899 and used before the Department in this proceeding, it appears that you used this language, You state that: "And many times did I tell him (White) that he was welcome to the possession of the land I had enclosed because I believed it should be his." Why did you make this statement so many times to Mr. White?

Hereupon a recess was taken to 1:30 o'clock p. m., April 1, 1902.

At which time the hearing was resumed, with the same
770 parties present as before.

(The last question was read.)

A. Well, we talked about it, talked about it forty times a day nearly.

Q. For how many days did you and Mr. White talk about this matter forty times daily?

A. Well, sir, I couldn't say how many times, but there are 365 days in a year, and I guess we came pretty near talking about it every day in the year.

Q. How long would your conversations be on the average?

A. Oh, half an hour or an hour at a time, different times during the day.

Q. For how many years did you have these forty conversations daily?

A. Well, that would run up to a pretty big figure, but I guess for about three years.

Q. You had made all these improvements which you have testified about at the time you were having these conversations with Mr. White?

Objected to because it appears these improvements have been made in 1895 and the inquiry goes up after 1895.

Overruled. Contestee excepts.

A. I don't think I did any more improvements after 1895. I don't remember of any improvements that I did. I had made all these improvements prior to the time, yes sir.

Q. Then at the time you had these many conversations
771 with Mr. White you were willing to surrender all your buildings and improvements to him without receiving a dollar compensation therefor?

Objected to because it appears affirmatively on the record from the testimony of this same witness that his buildings and improvements, with the exception of the little privy and a worthless fence were wholly on the railroad right of way and not within the limits of the land in controversy.

Sustained. Contestant excepts.

Mr. HEITMAN: I ask to have the answer taken.

A. I would not have relinquished my right to the buildings, because they were over entirely on the right of way; but I was trying to sell out all the time.

Redirect examination:

Q. Mr. Nagel, when he was on the stand, stated that originally, some time in 1889, I think, he filed a possessory claim to the land north of the right of way and that the line of his possession claim came down within a hundred feet of the center of the track. He also stated that before the government survey he had platted some of the lots there which extended within a hundred feet of the center of the railroad track. Now when you originally went to Clarks Fork and appropriated land there for the use of your buildings on the right of way, state whether or not you had any agreement with or lease from John G. Nagel.

A. Yes sir, I have him $70 for a lease for ninety-nine years on townsite lots. I disremember the block and the number now.

772 Q. State whether or not your enclosures were placed there in the extension of those old original lots.

A. Yes sir, they were; they were fenced in and I just knocked the middle fence out.

Q. But that was before the government survey?

A. Yes sir.

Q. And when it came to a question between White as homestead entryman and the other parties claimed under the townsite later, you recognized White's rights?

Objected to as immaterial, irrelevant and incompetent.

Objection overruled. Contestants except.

A. We thought the right of way was only 100 feet wide at that time, and that is the reason that I built on the right of way.

Q. So that the main part of the land proved afterwards and the part on which your buildings were erected proved afterwards to have been on the right of way?

A. Yes sir.

Q. Then you recognized the railroad's right to it and got a lease from it?

A. Yes sir.

Q. And to the fence and the privy and the fruit trees, you recognized that White was entitled to that land as against the townsite?

A. Well, I thought he was.

Q. And while you claimed the right of possession of this land as

against everybody else but White, you recognized that White
773 had the better right to the land within your enclosure, extending back off the right of way?

Objected to as incompetent, and asking for a conclusion of the witness. Sustained.

Contestee excepts.

Mr. LAMAR: I would like to have the answer.

A. Well, I thought he had. I tried to sell out and get away if I could. I didn't want to get mixed up in it. I had an idea I would stand as poor a show as anybody else.

Q. As to those conversations you had with Mr. White on that subject, how far was your place of business from White's place of business at the time these conversations took place?

A. About 100 feet or a little more.

Q. He was then agent for the railroad company?

A. I was directly opposite the depot back.

Q. And he often came to your place?

A. Yes sir.

Q. And you often dropped into the depot?

A. Yes sir.

Q. And the dispute was being discussed on every hand?

A. Oh, it was notorious all over the whole territory; everybody was talking about it.

Q. When you said you spoke forty times a day, were you speaking relatively or did you count the times?

Objected to as cross examination of his own witness.
774 Sustained. Contestee excepts.

Q. Did you count the times for each day that you talked with Mr. White?

A. No, I never did; never thought of such a thing.

Q. State whether or not any of these trees were on the land since acquired by John G. Nagel as a homestead?

A. I think they were; I think there is five or six of them; I won't say for sure. They were five years ago; I have not been there for five years.

Q. In your cross examination reference was made to a cash payment by Mr. Daugharty. State what the amount of the cash payment was.

A. A thousand dollars.

Q. And the $800 was the deferred payment that you took by compromise?

A. Yes sir, I had his note and I surrendered the notes.

Q. The pump you referred to as being worth $8 or $10 was located where?

A. That was a couple of feet over onto the ground that was claimed by White. It was about ten or twelve feet right back of the little house in the northwest corner.

Q. How deep was it dug?

A. It was dug about twelve or fourteen feet.

Q. Something had been said here, estimating its value and the

inside of it being worth something like $100. Is that correct? Did it cost anything like that?

775 A. Oh, no, I got it [illegible]ng for an old building. It only took a fellow a couple or three days to dig it.

Q. Who employed the lawyer, you or Daugharty, to draw up the agreement between you?

Objected to as immaterial and irrelevant. Objection sustained.

Mr. HEITMAN: And I object to it going into the record.

Objection sustained. Contestee excepts.

Q. State whether or not Mr. Daugharty was consulted in connection with the preparation of the agreement that you and he came to in regard to this matter?

A. It was all done in a day. I talked to Gordon and told him I would like to sell here; "can't you raise the money and buy me out?" Gordon wanted to know what I wanted, and I told him I would lump the whole thing off for $3,000, and he agreed to it; but I was to get a thousand dollars down, and the rest in that bill there. I had notes for the balance.

Q. After you came to that understanding, what was done towards commuting it?

A. He went out and went home and got a thousand dollars and came in and gave me one thousand dollars in gold.

Q. Any papers signed in connection with it?

A. No; he paid me the thousand dollars and we sent somebody for Tom Holmes, and Tom Holmes came up and drew the papers; I think it was Tom Holmes.

776 Q. And he set forth in that paper what your agreement was, did he?

A. Yes sir.

Recross-examination:

Q. About when was it Mr. Roberts, that you got this lease from Nagle about which you have just testified?

A. It was about 1900; it is twelve years now—I mean 1890.

Q. How far was the front of the Nagle lots you leased from the railroad track?

A. I don't remember exactly now; it was 100 or 110 feet. I know my building was 110 feet. I think my veranda just came out to the front of the lot.

Q. And it was 100 or 110 feet to the railroad?

A. Yes.

Q. How deep were these Nagle lots?

A. I don't remember.

Objected to as immaterial and irrelevant.

Contestee excepts.

Q. Do you remember the number of the lots and the blocks in which these lots were situated that you leased from Nagle?

A. No sir; I don't.

Q. I believe you stated that you tried to sell out and get away from Clark's Fork? Why did you want to get away?

A. Well, this land controversy was one thing, and there
777 was a quarrel going on all the time, and I wanted to get away from that.

Q. You were not afraid of losing anything by staying there?

A. Well, I didn't know what time the railroad company would take the lease away from me.

Witness excused.

HENRY BROWN, sworn on part of contestee, testified.

Direct examination.

By Mr. LAMAR:

Q. Are you the H. A. Brown who testified at a former hearing?

A. I am.

Q. State your age and occupation?

A. Age forty-two. I am now a homesteader clearing land and cutting some timber.

Q. State whether or not in the past you ever had any experience as a carpenter and contractor?

A. I have.

The REGISTER and RECEIVER: Where do you live Mr. Brown?

A. My post office address is Sagle, Idaho; I live at Algoma, one mile west of Sagle.

Q. State whether or not you ever resided in the vicinity of Clarks Fork?

A. I did.

Q. During what period?

A. I was in or near Clarks Fork from 1891 until about
778 1896.

Q. State whether or not you have been back there since you moved away.

A. I have been in and at Clarks Fork from two to a dozen times a year, since 1896.

Q. Are you familiar with the location of the buildings erected or belonging to George Roberts as they stood on November 27th, 1895.

A. I am.

Q. State whether or not the frame so-called residence building is on or off the right of way.

A. It was on the right of way.

Q. State how you know that fact?

A. There was a force pump for fire purposes in the rear, north of the building as the residence. It was about ten or twelve feet north of the building, and the pump now stands about a foot and a half or two feet north — line of the railroad company's right of way.

Q. You remember noting the relative position in your own mind when the building stood there?

A. I do positively.

Q. I believe it since has been burned down?

A. It was burned down since.

Q. Do you remember seeing a water closet in respect to which testimony has been given here?

A. I do.

Q. State as near as you can what was the value of that in November, 1895 and November, 1897?

A. It was fifteen dollars, not to exceed twenty dollars.

779 Q. As to the Daugharty barn and blacksmith shop, you may state whether or not that building or any portion thereof had been constructed on November 29th, 1897?

A. I never saw any building there during that time.

Q. State whether or not you know that it was not there at that time.

A. I know the blacksmith shop was not there. The outfit was in a little shack down on S. R. Catlow's place.

Q. Do you remember about being there when the barn was constructed?

A. I did not see any barn there. I stopped at Daugharty's house or at the Robert's house at the time one or two nights, but I never noticed any barn there.

Q. When did you first have any notice of that barn there?

A. I noticed that barn there first in about October, 1896 for the first time.

Q. Did you know Tom March.

A. Yes sir, I did.

Q. Did you ever have any conversation with him relative to the property spoken of in this hearing as to the March house?

A. I did.

Q. When and where?

A. Some time in June or July, 1897.

Q. What, if anything, did he say at that time relative to the ownership of that property?

780 Objected to as immaterial and irrelevant, for the following reasons: That there is no question before the court as to the individual ownership of property on this land in controversy, the question being as to the character of the improvements of the townsite claimants and not as to the title of individuals thereto. And is incompetent for the reason that any declarations made by Mr. March could not affect the claim of Mr. Johnson or any one else — the title of the buildings.

Overruled. Contestant excepts.

A. I met Mr. March there in Clarks Fork; but I want to say that I might be mistaken in this date, but will relate an instance which I remember, of being in Clarks Fork at the time, about the time Mr. Foreman was living in the Greenough Bascom-Butler building, which was the time I was there. I met Tom March on the platform in the evening at the Northern Pacific depot as I got off the train.

(Cross:)

Q. When was this?

A. It was at the time Foreman was moving his building; I think it was in June or July of 1897

And Mr. March invited me to go home and sleep with him that night, as the hotel was closed. I asked him where he slept. He said, "I have got a building of my own now; I am a property owner in Clarks Fork." He said he had a house and he said he had it on the land in dispute. He said he didn't know whether White would allow him to keep the building or not if he won the townsite.

781 Q. Did you ever have any other conversation with March relative to White's attitude towards the townsite claimants?

A. I did.

Q. State that conversation.

Objected to as hearsay.

Objection sustained, but the answer admitted. Contestant excepts to the admission of the answer.

A. He says in the latter part of 1896, when I met Tom March at the east end of the Clarks Fork railroad bridge, across the river—I was going down to see Al Durr, and I met March coming up; and he asked me or I asked him rather how the townsite was coming along. He says, "White is trying to hold the whole townsite, but he will have a hell of a time doing it;" the very words he said.

Q. State whether you ever had any conversation with Ruben Johnson on the same subject?

A. I did.

Q. What did he say?

A. He said that the townsite people of Clarks Fork he thought were sure to beat White in the townsite. He says, "If we don't beat him out we will wear him out; we will get a new hearing and take it right back over the same road it has been going."

Q. When was that?

A. That was about February, 1902, in Sandpoint.

Contestant moves to strike out the alleged statement of Johnson of February, 1892, as not being embraced with any of the issues before the court.

782 Sustained. Contestee excepts.

Q. Are you familiar with the location of the John E. Whitcomb lots on the land in controversy.

A. No sir, I am not.

Q. Have you ever seen such improvements?

A. I have not.

Q. You have heard the testimony of Mr. Ruben Johnson here relative to the enclosure around about seven lots and within which he subsequently constructed a barn. Are you familiar with the premises to which reference was made?

A. I am.

Q. State whether or not any of the improvements which he mentioned in his testimony were on any of those lots on November 29th, 1897?

A. There was no improvements on that lot at that time.

Q. State how you know this, Mr. Brown?

A. In passing by there and over those lots. In October, 1898 there was neither barn nor improvements at that time.

Q. You heard the testimony of Mr. Johnson to the construction of a barn within the enclosure of what he has designated as the March house?

A. I have.

Q. State whether or not there is any barn at this place or was on November 28th, 1897?

A. No barn there.

Q. Do you know where Andrew Hasselroth was living in November, 1897?

783 A. Yes sir, I do.

Q. Where?

A. He was working for me, him and five of his family were at my place in November, 1897 on section 17, close to Sandpoint, Kootenai County, Idaho.

Q. How far is that from Clarks Fork.

A. About thirty miles.

Q. Previous to his going to work with you, where was he or any part of his family residing?

A. They were all in Hope.

Q. How far is Hope from Clarks Fork?

A. Ten miles.

Q. State what if any stock or other home articles he had with his family in Hope?

A. In November I got a cow from Hasselroth and took it to Hope, and a pig and a lot of chairs and some bed springs and bedding and such things as that from his house where he lived in Hope to my place, went there and got it.

Q. You are certain he did not move back to Clarks Fork by November 29th, 1897?

A. No, I know he had not, because there was four of his family living in Hope at the time. There were nine in the family and five were at my camp.

Q. Mr. Brown, you are familiar with the various properties in Clarks Fork about which testimony has heretofore been adduced?

A. Yes, I have seen a good many of them.

Q. And have given some consideration as to their value in November, 1895 and November, 1897?

784 A. I have.

Q. From such estimates as you have made, I desire you to estimate the value of the buildings on the following properties as they are mentioned to you, both in 1895 and 1897 if they were there at those periods. First, the Whitcomb Brothers & Nagel store?

A. In 1895 I put that building at about $1150, including the building and all.

Q. Was it completed then?

A. No.

Q. Did you take into consideration the cellar.

A. I did, all that was attached or connected.

Q. What in your opinion was its fair valuation in 1897 as it then stood?

A. The store, cellar, shelving, counters, and all connected, show cases and all, $1950.

Q. Second, Butler's saloon property as it stood in 1895?

A. Two hundred and fifty dollars; it was only a shell.

Q. State whether or not you were offered that building at any price and at what?

A. I never was offered that building.

Q. State what in your opinion was the value of the buildings as they stood in November, 1897?

A. About $550.

Q. They have been moved in the meantime, I believe?

A. Yes sir, and another building added to it. There had
785 been another building added to the Butler saloon building.

Q. State if you can whether or not that building, which was moved off the right of way, was ever offered to you before it was moved?

A. The building known as the Greenough-Bascom-Butler building was offered to me by T. L. Greenough for $75. I did not consider it was worth it, so I did not buy it. That is the same building added to this.

Q. Third, the Edwards building or buildings as they stood about November 1895 or a little before?

A. About sixty dollars in 1895.

Q. What did you value the buildings he had in November 29th, 1897?

A. About $95; they were small, cheaply constructed buildings.

Q. Fourth, the laundry building, belonging to Butler Brothers, in 1895.

A. About $15. It was not worth any more in 1897; it was a shell.

Q. Fifth, the March house was worth what as it stood in November, 1897, with all the additional outbuildings and whatever there was?

A. That was worth about $60 in 1897.

Q. What would you value the house where it stood in 1895?

A. About fifteen or twenty dollars.

Q. Sixth, the old store formerly occupied by Hasselroth,
786 belonging to Wh-tcomb Brothers, what was that worth in 1895?

A. About $45 or possibly $50.

Q. What was it worth in 1897?

A. About fifty-five dollars. They had been putting a little improvements on it, I believe, some paper, and it might have been worth ten or fifteen dollars more.

Q. Seventh, the Whitcomb Brothers barn as it stood in 1895?

A. About $20.

Q. How about 1897?

A. About the same I should judge.

Q. Eighth, the old Vinton house, said to belong now to Mrs. Lloyd, was worth what in 1895?
A. I would say about $200.
Q. How about 1897?
A. I think about the same, not any more.
Q. Ninth, the old Housten house, that part that belonged to Whitcomb; what was it worth in 1895.
A. Thirty to thirty-five dollars; I should say about thirty-five dollars.
Q. What was that same part worth in 1897?
A. I think there was an addition put to that, but the same part would not be worth over $35.
Q. What was the value in 1897 of the Hutton addition?
A. About $60, the whole thing.
Q. That would be $25 for the Hutton addition?
A. Yes sir.
787 Q. Tenth, the old post office building, what was that worth in 1895?
A. I would say that was worth about $30.
Q. Of course, these questions have relation to November, 1895?
A. I understand.
Q. In November, 1896, what was the property worth?
A. Worth about $55 to $60. There had been some improvements put on it.
Q. By whom were those improvements put on?
A. I think by Mrs. Thibadeau, the postmistress.
Q. Eleventh, the Whitcomb residence, south of the railroad, what was that worth in November, 1895?
A. If I remember right, that is a box house, and worth about $250.
Q. What was that same building worth in November, 1897, together with such additions as they had put on?
A. About $250. I don't remember any addition being made to it.
Q. It is claimed there is a barn, chicken house, woodshed and other such outbuildings can you give me an estimate of their value in 1895, such as were there?
A. I should judge they would be worth $50.
Q. How about 1897?
A. About the same.
Q. Now as to fruit trees, what do you value those at in 1895?
788 A. I don't know as I remember, but I should think they were worth $100 in 1895.
Q. What do you suppose they were worth in 1897?
A. They must be worth $150.
Q. Twelfth, what price would you put on the Whitcomb fence and enclosure as it stood in 1895 and how long had it been there?
A. I think it was worth about $30.
Q. Well, it was not worth any more; it would decrease, posts rot.
Q. Can you give value of it in 1897?
A. Worth about the same, I should think about $30.

Q. There was some dispute about the time of construction of Fleming's house, but what was its value when constructed?

A. I saw the house, but I don't remember just the date. I think about $140.

Q. Does that include the fencing?

A. I don't remember so much about the fencing. The building was pointed out as the Fleming house.

Q. How about the Peter Larson house, as it existed in 1897?

A. That was worth about $20.

Q. Mr. Brown is there any way you can refresh your memory relative to the Fleming house?

A. I will say that at Clarks Fork I made a list of the values, as to what I considered those buildings worth, and I can look at that list and see what I bought at that time.

789 Q. Whatever estimate you made was independently of what anybody else told you?

A. I made my own estimate independent of anybody. I took nobody's advice, asked nobody's advice.

Q. Some reference has been made to two lots as enclosed by a Mr. McWilliams. What would the fencing be worth for those enclosed lots, including labor and everything, as of those November, 1897?

A. I don't know anything about that fence, but I have figured about the cost of fencing each one of those lots.

Mr. HEITMAN: I object to any evidence unless it is in response to the question.

Q. Well, I mean the character of fences in Clarks Fork what are they as a rule.

Objected to as incompetent, for the reason that McWilliams has not been shown by this witness to be of any particular character

Sustained, so far as it relates to giving general description.

Q. Do you remember the fence of Carpenter Wilson?

A. I don't know anything about Wilson's fence.

Q. Do you remember the fence of Oullet?

A. I don't know anything about those fences.

Q. Mr. Brown, at the prior hearing, you substantially stated that before the Government survey Mr. White told you that it was his purpose to claim a whole 160 acres which should become contiguous to the track on which his improvements then stood, whether it

790 should embrace the land in controversy or not.

State whether or not you ever told Mr. Moses P. Whitcomb what Mr. White said on this subject, and if so when?

Contestant objects to this evidence as incompetent, for the following reasons: First, the evidence sought to be elicited by this question is not embraced within any issue to be passed upon at this hearing. Second, the question itself shows that the witness testified on the former hearing, and therefore it is a repetition. They are trying to bring into the record at this hearing an effort to show non-acquiescence on the part of White at the time and a long time prior to his entry, the first date on which you are authorized to hear evidence

under this order; and it is objected to not only as incompetent, but as being based upon an obviously irrelevant line of questions.

Mr. LAMAR: I will satisfy your Honor- wishes that this is newly discovered evidence on our part.

The REGISTER and RECEIVER: I will sustain the objection. but allow the question to be answered, upon the ground that, although not without the scope of the inquiry, it is maintained by counsel to be a very important question.

Contestant excepts, and contestee excepts.

A. I had a conversation with Mr. Whitcomb in regard to clearing some land to build a house on. I told him at that time I
791 could not promise to clear the land. Afterwards I met Mr. Whitcomb. I told him I did not want to clear the land, for two reasons; one that I had not time, and one that I thought he was getting on the land that would be embraced in White's homestead entry, and White had told me if he got on that land that he would certainly hold the land and everything on it.

Q. State when this was, and with respect to what clearing for Mr. Whitcomb.

A. Well, about the time, or shortly after Mr. White had this lumber on the ground, I was at Mr. White's buildings helping him cut some trees to keep them from falling across the buildings. The sills were laid and the floor joists.

Q. What improvements was it Whitcomb was trying to get you to put in?

A. Well, it was on that day, some time about April. Mr. Whitcomb wanted me to clear land by which he could build his buildings on.

Q. What year?

A. That was 1891.

Q. And this was before Mr. Whitcomb's residence was constructed or the clearing had for that residence, was it?

A. It was, it was clearing to build buildings on. It was something like a week after that happened that I had the conversation with Mr. Whitcomb.

Q. Mr. Brown, in the year 1897 state whether or not you had any conversation with John E. White relative to the taking up by
792 you of any land for townsite purposes, and if so, state what that conversation was?

A. I did, sometime about in October, 1897, I told Mr. White I was going to fence four or five lots on the south side of the railroad track, right along the line of the right of way and along the line of the county road leading from the railroad to the ferry landing. Mr. White told me that he did not want those lots taken by any person and would not allow them to be taken, because they were his homestead and he intended to hold the whole 160 embraced in that homestead.

Q. You say he used the words "one hundred and sixty" at that time?

A. He did.

Cross-examination.

By Mr. HEITMAN:

Q. When was it you had this conversation with Mr. Whitcomb?
A. It was sometime the latter part of April, and possibly the first of May, in 1891.
Q. Where did this conversation take place?
A. It took place close to the Northern Pacific depot.
Q. Where was Mr. White living at that time?
A. He was living in the Northern Pacific depot.
Q. He and his family were living in the Northern Pacific depot?
A. I believe so.
Q. He was the station agent at that time?
793 A. Yes sir.
Q. Now you say that Mr. Whitcomb wanted you to do some clearing?
A. Yes sir.
Q. Where was the clearing to be done?
A. It was to be done on the south side of the track between the depot and where John E. White's residence is now.
Q. His residence was not there then?
A. The foundation was laid, the sills and joists and lumber was on the ground at the time.
Mr. LAMAR: Who is that?
A. John E. White is the one referred to.
Q. What kind of clearing did Whitcomb want you to do?
A. He wanted me to clear enough to put his building on.
Q. What was it you say you told him?
A. I told him I would see him later about that. Now, I wish to say right here that if this is the conversation that you are referring to in which I told Mr. Moses P. Whitcomb that White intended to hold this land, that I am mistaken in the date. Let me explain this. This date I have is about the time I told Mr. Whitcomb that White intended to hold the land, and not the time that he asked me to clear the land.
Q. Well, get it straight. When did you have this conversation with Mr. Whitcomb that you have testified about, Mr. Brown?
794 A. In regard to clearing the land?
Q. I am talking about the conversation you testified about, Mr. Brown. I don't know anything about it other than that.
A. There was two conversations.
Q. I want to know about this conversation you have been testifying about today, Mr. Brown?
A. Well, I testified that Mr. Whitcomb asked me to clear some land.
Q. When was that conversation?
A. That was some time about the middle of April, I think, in 1895.
Q. What did you tell him?
A. I told him I couldn't clear no land at that time.
Q. Why?

A. I didn't tell him why. I didn't have the time.

Q. You didn't tell him then that it was because White was claiming the land?

A. No sir, I did not tell him at that time.

Q. Then you were mistaken when you testified that you told him that *that* there was two reasons why you could not clear this land, one was that you had no time, and the other was that you understood White was claiming the land?

A. No sir, I am not mistaken in that conversation; but it was at a different date.

Q. When was that date?

A. That date was sometime the last part of April or the fore part of May.

795 Q. Where was this conversation?

A. It took place near the depot.

Q. And had Whitcomb cleared any of the land at that time?

A. He had not because he asked me about clearing the land at that time.

Q. Why didn't you testify to this on a former hearing, Mr. Brown?

A. I guess it was because it slipped my memory at the time, or wasn't asked it. I think I answered every question asked me.

Q. When did this matter first come to your memory after the first hearing?

A. Oh, I don't know; I thought of it several times.

Q. How long after the first hearing?

A. I would not say just the date; it might have been a month or two and it might have been a year after.

Q. Did you tell Mr. White about it as soon as your memory became refreshed?

A. I don't know that I did.

Q. Do you remember when you first told Mr. White your memory had been refreshed?

A. I don't think I told Mr. White that but a few days ago, a week or such a matter.

Q. How often had you met Mr. White since the original hearing?

A. Oh, I met him from two to fifty or a hundred times a year, maybe, off and on.

796 Q. Then you had met him about 500 times since this first hearing, had you?

A. Possibly.

Q. And you never told him about this matter until a few days ago?

A. I did not consider the matter of importance.

Q. You and Mr. White had talked about this townsite litigation frequently since the first hearing?

A. Hardly talked about anything else, because everybody talked about it.

Q. You and he frequently talked about this townsite litigation since the first hearing?

A. We have talked about it lots of times.

Q. You say you had talked with Mr. White in October, 1897, about your building on some lots south of the railroad?
A. I did.
Q. Was that ground unenclosed at that time?
A. I think he had a fence along the right of way.
Q. Who had a fence?
A. White, and also down the ferry road.
Q. And you wanted to build inside of the fence didn't you?
A. I didn't intend to build; I was going to fence some lots.
Q. Were those lots inside of Mr. White's enclosure?
A. They were.
Q. Why did you want to fence them?
A. Because I had heard it stated that that part was in
797 the townsite claimed by the townsite people.
Q. What was your purpose in fencing those lots?
A. After the townsite business was settled I intended to build there.
Q. Now, about the Hasselroth family, Mr. Brown; where was that family living in November 1895?
A. Well, I don't know; I think they were in Clarks Fork.
Q. Did Mr. Hasselroth have a home there?
A. I think at this time in 1895 he was living in the old store building of Whitcomb Bros. & Nagel.
Q. How large was his family in November, 1895?
A. I think he had eight children, if I am not mistaken; seven or eight.
Q. A wife?
A. Wife and himself.
Q. Ten in the family.
A. Nine in the family.
Q. Where was the Hasselroth family living in November 1897?
A. I will give you the names of each one of the family if you want, and where they were, to my knowledge.
Q. Well?
A. Hasselroth and Mrs. Hasselroth, Lottie, Jennie and I forgot another one, was at my camp, at Sandpoint.
Q. What were they doing there?
A. Hasselroth was cooking for me, and his family lived there in the tent.
798 Q. How long was his contract of employment with you?
A. He worked for me from the latter part of October, until the latter part of April.
Q. Was there just temporarily?
A. That is all, with me; but I will say that the balance of his family, four in number, was in Hope, and lived in Hope right back of the round house.
Q. Where were they at that time?
A. In November they were in Hope.
Q. Were any of his family in November, 1897, in Clarks Fork?
A. Not that I know of.
Q. Might they have been there and you not know it?

A. I saw his whole family in November 1897, part of them with me and part in Hope.

Q. Might part of his family been in Clarks Fork in their home there in November 1897 and you not have known it?

A. They might at some time, but at the time I saw them they were there where I say.

Q. In November 1897, Mr. Hasselroth still claimed this building, this dwelling house, in Clarks Fork?

A. I don't know.

Q. Dida't you testify that he made improvements on it in 1897?

A. I said between 1895 and 1897 there had been some improvements made on it.

Q. There were improvements made on the Hasselroth
799 building after November 1895 and prior to November 1897?

A. I think there had been some papering done on it.

Q. You testified that the building was worth a little more in 1897 than in 1895?

A. I think so yes.

Q. Who made those improvements?

A. I don't know.

Q. Do you know who made them or had them made?

A. I don't know.

Q. *I* Did not Mr. Hasselroth at all times between November 1895 and 1897 claim Clarks Fork as his home?

Objected to because it calls for a conclusion. Overruled. Contestee excepts.

A. He did not to me.

Q. He has been living in Clarks Fork for a long time, hasn't he?

Objected to so far as pertaining to after 1897. Overruled.

A. I don't know.

Q. You left Clarks Fork in 1896 I believe, Mr. Brown?

A. I left that vicinity; I was in and around Clarks Fork up to 1896; held it as a residence.

Q. What time in 1896 did you move away?

A. I don't know just the time; some time in the fall of 1896 I went to Hope.

800 Q. In giving the value of the Whitcomb store you stated that it was about $1150 in November, 1895, but that it was not completed. Now if the building had been completed—if it should turn out that you were mistaken about—what would have been its value in November 1895?

Objected to as immaterial and irrelevant. Overruled. Contestee excepts.

A. If it had been completed in 1895 as I saw it in 1897, it would have been worth $1950. That is my estimated value.

Q. What portion was completed in November, 1895?

A. Well I had not seen the concrete cellar that was under the

house at that time; and there has been more shelving and show cases put in. I had not seen the hall upstairs at that time.

Q. Do you know whether the hall had been completed at that time?

A. I don't know, I had not seen it at that time.

Q. Do you know of your own knowledge that the cellar had not been completed at that time?

A. I had not seen the cellar at that time.

Q. Then you don't know of your own knowledge, Mr. Brown, whether the Whitcomb Bros. — Nagle's store had been completed in November, 1895, or not?

A. As I have stated before, I never saw the cellar in 1895 and could not say that it was not completed, nor the hall.

Redirect examination:

801 Q. Mr. Brown, some inquiry has been made as to the time you discovered that the second conversation between you and Mr. Whitcomb was of importance in this case. Will you state where and with whom you were talking when this matter came up very recently?

Objected to as immaterial and irrelevant.

Overruled. Contestant excepts.

A. I don't remember just how it did come about, or who all were present. It seems to me as though I mentioned it to Mr. White first, the first mention I made of it.

Q. State whether or not you mentioned it to Mr. White's counsel or either of them?

Objected to as leading and cross examining of counsel's own witness.

Sustained and answer not allowed to be taken.

Contestee excepts.

Q. To whom if any one else did you mention this conversation before coming to Cœur d'Alene?

A. Well, I told Mr. Lamar and Compton White both.

Recross-examination:

Q. When did you tell this to Mr. Lamar?

A. The next morning after he arrived in Clarks Fork.

Q. Well when was that?

A. It was about the 22nd or 23d of March, 1902.

Q. When did you tell it to Compton White?

A. I told it to him the same evening.

802 Excused.

Whereupon an adjournment was taken herein until 9:15 o'clock tomorrow morning, April 2nd, 1902.

Hearing resumed April 2nd, 1902, at 8:15 o'clock a. m. Present the same parties as before.

Thereupon the following proceedings were had, to-wit:

C. I. WHITE sworn on the part of the contestee.

Direct examination.

By Mr. LAMAR:

Q. State your age and postoffice ad-ress?

A. Twenty four years old; postoffice address Clarks Fork, Idaho.

Q. State whether or not you reside with your father on the homestead?

A. I reside with my father upon his homestead. The house is on the 40 acre strip.

Q. Are you the same Compton I. White who testified at the prior hearing?

A. I am.

Q. Mr. White, between November 27th, 1895 and November 29th, 1897, state whether or not you ever had a conversation with Jason Edwards relative to the residence building which he had placed on the land some time in 1895?

Objected to by contestant as incompetent, for the reason that Mr. Edwards was not asked about such a conversation when he was on the witness stand and given an opportunity to deny or explain.

803 Object-on sustained, but the answer is permitted to be given.

A. I did.

Q. State what Mr. Edwards said on that subject in the conversation?

A. It was prior to 1897 and after he built the house, that he said he had built his house on the land, but that he did not claim the land the house was built on, that he only put it there through necessity, and that should my father finally be successful in his contest, that he would make no trouble and would get out if necessary, move out and leave the house.

Mr. HEITMAN: Contestant moves to strike out this evidence, as being wholly immaterial and irrelevant; Mr. Edwards having no right to this land at the time could acquire none because if the townsite claimants succeeded he would have to acquire title thereto through the probate judge.

Motion denied. Contestant excepts.

Q. Mr. White you heard the testimony of Jason Edwards while on the stand relative to services by your father of a notice on him in connection with the construction of his barn. State whether or not you were with your father on the occasion to which reference was made when notice was given?

A. I was.

Q. State whether or not you heard all that was said by your father and by Mr. Edwards on that occasion?

A. I did.

804 Q. On page 120 the following appears as a part of the testimony of Mr. Jason Edwards: "John E. White came to me and told me that to protect himself in the townsite fight he had to forbid me from building a barn. Q. State what else? A. Then he told me that I understood the feeling between him and me and that I was all right in building whatever I wanted to." State whether or not your father on the occasion mentioned, told Mr. Edwards that he was all right in building whatever he wanted to?

Contestant objects as leading. Over-uled.
Contestant excepts.

A. He did not.

Q. Mr. White, were you acquainted with Ruben Johnson on May 1, 1897?

A. Yes sir.

Q. State whether or not at that time your father and he were on speaking terms?

A. They were not.

Q. State how you recall this fact?

A. I recall this fact that in the early spring of 1897, during the month of April, I think the first part of the month, that our fence around a portion of our homestead was not in good condition, and that Mr. Ruben Johnson had a habit of driving his cattle down along that line of fence so that they would go into our pasture, and we would take the trouble to drive them away from this place, and that Mr. Ruben Johnson met my father on the track at the time and threatened him with a criminal prosecution for driving
805 his cattle on the track, and talked in a loud and threatening manner and that my father took exceptions to what he said and that we came home then; that we said very little him about it, but we came home and had no more to say to him.

Q. State whether or not your father continued to be on speaking terms with him after that?

A. No sir.

Contestants objects as immaterial and irrelevant.

The Register and Receiver: The objection is overruled but I think you have gone far enough with that. I will sustain an objection to anything further on that line.

Q. Now, Mr. White, are you familiar with the location of the buildings and parcels of land in controversy?

A. Yes sir I am.

Q. State whether or not you are familiar with the same as represented on an alleged plat filed in this case on behalf of the townsite claimants at the prior hearing. Refer-ing to contestants' Exhibit "A."

Q. I am.

Q. Will you state from that plat the location of the enclosure and

of the lots mentioned by Mr. Ruben Johnson while on the stand, being the place where his barn and enclosure now are?

A. The lots and enclosure and barn mentioned are on the north side of the Northern Pacific railroad, in block 3, lots 8, 9, 10, 11, 12, 13, and 14 the barn being situated on lot 14 and may be
806 on 13. There are in all seven lots; the fence runs along the line of Grand avenue, as on exhibit A of this plat and also along the line of Pine street, thence back along the line of the alley to the north east corner of lot 14, and thence back to the southeast corner of 14.

Q. Does this enclosure cover the land described by you?

A. Very nearly and encloses the whole seven lots.

Q. State whether or not 14 is embraced within this enclosure?

A. Yes sir.

Q. State whether or not lot 8 is also within the enclosure?

A. Yes sir.

Q. Then how many lots are there?

A. Seven in all in this enclosure.

Q. State whether prior to or on November 29th, 1897, there was any clearing, fencing, buildings lumber or any other improvements which have been placed on those lots, or any of them, by said Ruben Johnson?

A. There was not.

Q. Mr. White, will you kindly use the same plat and refer to the location of what is known as the Edwards residence and state where it is located?

A. The Edwards residence is located on the north side of the railroad track, on lot 1 in block 8.

Q. State whether or not any of the Edwards buildings are on lot 2, block 8.

A. No part of the residence; there is a small outhouse on
807 lot 2.

Q. State what if any improvements or cultivation has been made or carried on by your father on the part between November 27th, 1895 and November 29th, 1897, on that part of the 40 acres south of the railroad and west of the county road?

Mr. HEITMAN: We object as immaterial and irrelevant, the character of White's occupancy or improvements of any land in controversy not being included within any issue submitted on this hearing.

Objection sustained, because it does not come within the scope of the inquiry.

A. West of the ferry road and south of the railroad track we enclosed in the fall of 1896 all of the portion of the forty in dispute except that portion enclosed by Mr. Whitcomb and a small lane between the two fences.

Q. State where Mr. Whitcomb's enclosure is?

A. Mr. Whitcomb's enclosure included 10, 9, 8, 7, 6, 5, 4. I want to make reference to a plat that I have made myself.

Contestant objects to any plat being used which has not been included in evidence.

Objection sustained.

The REGISTER and RECEIVER: I think the evidence should be given from plats that has been filed in the case. He has a right to refresh his memory, but so far as using the plat is concerned, we want it thoroughly understood the witnesses' answers are given from the official plat.

808 A. As shown by the official plat, marked Contestant's Exhibit "A" Mr. Whitcomb's fences enclose lots 10, 9, 8, 7, 6, 5, 4, and up to the line of lot 3, and running back from there directly south to the point where lot 4 in block 14 intersects Division street and thence along the line of that street back to the line between section 3 and section 2 and following that line back to the point of beginning, enclosing that portion of Division street. That land was fenced in the spring of 1896 and used since that time during a short time as a milking pen and cow lot, and then used for a potatoe patch since.

By Mr. HEITMAN:

Q. South of the railroad track?

A. South of the railroad track.

Q. Now, Mr. White, are you familiar with the new barn and blacksmith shop refer-ed to as having been constructed by Mr. Daugharty?

A. I am.

Q. State whether or not any part of the structure was commenced or completed on November 29, 1897?

A. The barn was not commen-ed at the time. Mr. Daugharty had some hay on the ground I believe and a tent over it about that time, but there was no barn.

Q. How about the blacksmith shop?

A. The blacksmith shop was not moved there until after November 27th, 1897

Q. November 29?

A. 27th or 29th, the day I mentioned.

809 Q. Mr. White do you remember the little building which has been referred to in the testimony here variously as the Roberts residence and as the Roberts house?

A. Yes sir.

Q. State whether or not the building was on or off the right of way?

A. That building was entirely on the Northern Pacific right of way.

Q. How do you fix that fact?

A. I fix this fact for the reason that during the prior hearing, when some statement was made regarding the location of that building that I had a doubt as to just whether that building was wholly upon the right of way or not and that after I returned to Clarks Fork I took the pains to look and see where that building was located and I found that it was located on the right of way.

Q. What plan of observation did you carry out in arriving at that conclusion?

A. I went to some place on the Northern Pacific right of way, the intersection of Main street, as shown by the plat and looking along the line of Mr. Whitcomb's post that supported the upper porch of his store, and noticed that the building was to the south of a line that would intersect Mr. Catlaw's fence, which I know to be in the right of way line, and that the building would be south of the line drawn from those posts to Mr. Catlaw's fence along the right of way line.

810 Q. Did those posts to the Whitcomb store come up to the edge of the right of way?

A. I think they were right near the edge.

Q. How near?

A. I think they were right on the edge, the outside of them.

Q. State whether any of the buildings referred to as Roberts' buildings were off the right of way in part or in whole, save and except the privy and the little pig pen in the extreme rear of the enclosure?

A. There were no buildings off the right of way save those.

Q. How about the small pig pen to which I refer?

A. The pig pen was back of the forty in dispute, on the land owned by Mr. Nagel.

Q. How about the privy?

A. The privy sat not far from the right of way line on the forty in dispute, near Mr. Roberts, on the eastern side of the ground shown to be enclosed by Roberts.

Q. What do you suppose that privy was worth?

A. The same man that built that built ours.

Mr. HEITMAN: Give a direct answer.

A. (Continued). I will give a direct *na*swer; that it was not worth over $15 and I have good reason to know it.

Q. Now as to the fruit trees referred to as being in the rear of Roberts' building. State whether or not any of them were on the Nagel homestead?

811 A. I think at least two thirds of Mr. Roberts' trees were on Mr. Nagel's homestead; the large trees were on Mr. Nagel's homestead.

Q. I don't mean in number but in bearing quality, is that right?

A. I say two-thirds; I mean one-third; I mean one third in number were on Mr. Nagel's land.

Q. Now, Mr. White, I wish you would locate on the map what has been referred to as the March house and locate the enclosure surrounding the house?

A. I will be compelled to refer to this private plat again as it is not indicated on this one, exhibit "A". As is shown by the plat marked Contestant's Exhibit "A" the house known as the Tom March house is on lot 12 in block 5.

Q. Does the enclosure follow the line?

A. The enclosure follows the line.

Q. State whether or not there is any barn, or was on November 29th, 1897, on this place?

A. There was no barn in this enclosure.

Q. State if you recall the size of the woodshed there?

A. I recall that the wood shed was very small; I should judge it was not over 10x8.

Q. State, Mr. White, whether or not you overheard any conversation between Mr. March and your father relative to the building which he placed on the lot between November 25th, 1895 and November 29th, 1897?

Objected to by contestants as hearsay.

812 Objection sustained, but the answer is allowed.

A. I did.

Q. State the substance of that conversation as best you can recall it and about the time as to——

A. (Interrupting.) Well, it was about during I think the month of May, 1897, that Mr. March was in the depot and said that he had got that little house from Foreman for work, and that he did not have a place to put it and that he was going to move it to another place on the forty, and that he did not want - my father said, "well I will have to notify you as I notified the rest of these people, if you put the house there, of if you get possession of that house, that I will have to hold it and I can't make you any promise," and March said that if my father wanted it it would be all right, and that he would not give him any trouble.

Q. Now was this at the time he was moving or about to move the building?

A. I think he had moved it; I think it was during the month of May. I am not positive as to the time that Mr. March did move the building. I know he moved it back previous to the——

Q. What time with reference to the Foreman building?

A. Before Mr. Foreman moved his building and this house had to be moved out of the way so Mr. Foreman could move his building in.

Q. If Mr. Foreman got his buildings on April 5th, 1897, could it have been as late as M-y?

813 Contestant objects as cross examination of his own witness. Objection sustained.

A. Well, I am not positive whether Mr. March had that house at that time or was about to move it, but I know it was about the time he was moving the house that he came into the office.

Q. Now, Mr. White, state whether or not you know Mr. Hutton?

A. Yes sir.

Q. And state whether prior to the construction by him of the house mentioned in the testimony, any notice was given him by your father in your presence?

A. Yes sir.

Q. State the conversation and the time and place?

A. I think it was in the fall of 1896, when we were clearing in

our field on the south side of the track, Mr. Hutton came down to the field and wanted to know—said he had no place to live and would like to put up a house on the forty, said that he did not like to get into any land contest, but wanted to know if he put up a house there after my father finally got title to it, if he would assure him that he would not be hard on him in the settlement. Father told him not to build, that he did not want anybody to have any town on it at all and that he could not make him any promise as to what he would do after he got title to the land and warned him
814 that if he did build he would hold the improvements.

Q. State whether or not between November 27, 1895 and November 29, 1897, you overheard any conversation between your father and one J. S. Foreman relative to the occupancy or building by him of any buildings on the land in controversy. State as nearly as you can the time and place and any part of the conversation that you heard?

A. I heard such a conversation at the depot and just after Mr. For-man had bought the buildings, the Butler buildings.

Mr. HEITMAN: Give the date.

A. It is of record when I heard it; I don't remember when I heard it; it was in 1896 or in 1897.

Mr. HEITMAN: I ask the court to require the witness to fix a date.

A. I say it was just after Mr. Foreman had bought the building and it is of record. I don't remember the exact date but I think the record shows the buildings were bought in the fall of 1896, and I think it was early in the—well, it was a short time after they were built. I won't state the exact date, a short time later Mr. For-man bought, that he came over to the office and said he had bought these Butler buildings, told my father he had bought the Butler buildings; he said he wanted him to be easy on him. He said he had bought them from Whitcomb Brothers. My father said they had no right to sell them, had no right to sell the buildings that he must look to Mr. Whitcomb for his money;
815 that he would hold the buildings, that they were on his land and he did not care to dispose of any of these buildings; that if Mr. White would not he would look to the parties he bought from for the money.

Q. Was this conversation before or after Mr. For-man placed additions on the buildings?

A. Before and I want to say further in this connection that I don't think my father knew that I heard the conversation.

Mr. HEITMAN: I object to any thoughts. That is not evidence. Let him state what was said and done.

Q. Mr. White where were you when you heard this conversation and where was your father and Mr. Foreman?

A. I was in the depot at the desk, and my father was outside of the depot, but the window was up and I was sitting at the desk. I heard him out there; I did not hear the whole conversation, but I heard that much of it.

Cross-examination.

Mr. HEITMAN:

Q. When was it that you heard part of this conversation between your father and Mr. Foreman about these Butler buildings.

A. It was after Mr. Foreman had bought the Butler buildings.

Q. Give the date.

A. I only heard part of the conversation relative to Mr. Foreman having bought the Butler buildings and I don't remember
816 the exact date but I knew it was afterwards.

Q. How long after?

A. A short time.

Q. In what year was it?

A. It was in the late fall of 1897; I think it was the early spring of 1897 or late fall of 1896; it was shortly after Mr. Foreman had bought those buildings.

Q. When Mr. Hutton inquired of your father about making improvements on this land in controversy, did Mr. Hutton state what he desired to build?

A. He said "over there"; I inferred on the north side of the track.

Q. Did he state what kind of building he wanted to put?

A. Said he wanted a place to live.

Q. Did he state he wanted to build an addition to a house partly owned by Whitcomb?

A. He did not say anything about it.

Q. He said nothing about the Whitcomb house?

A. He said he wanted a place to live.

Q. Did your father give him a written notice?

A. No sir, not in my presence.

Q. How did your father give Tom March any written notice about not building on the land in controversy?

A. Not in my presence.

Q. You say the Roberts residence is entirely on the right of way?

A. I do.

817 Q. And the reason you know is because you made some eye measurement?

A. Yes sir.

Q. Did you not make any actual measurements with line?

A. I made no actual measurements, except by knowing the distance the house was from the right of way and knowing the distance between the houses; I know by that that it is on the right of way.

Q. Now this land which your father used south of the railroad track for a potato patch and milking pen, will you designate on that plot which blocks and lots he used for that purpose, that is contestant's exhibit "A" used on the former hearing.

A. Will you please confine that as to dates Mr. Heitman.

Q. You said it was fenced in the fall of 1896?

A. Yes sir; what dates?

Mr. GRAHAM: The land that you occupied there he is after.

Mr. LAMAR: Any time you occupied it.

Q. No, between those two dates, of course, 1895 and 1897.

A. We have enclosed and used a parcel of land lying west of the ferry road and south of the railroad; that in Contestant's Exhibit "A" is marked in block 12; we have it all enclosed, marked blocks 12, 13, 15, 16 and a portion of 14, between these dates, and were using as milk pen a large part of what is marked as blocks 12
818 and 13 as potato patch, and cleared blocks 3 and 12 between those dates.

Q. Now do those blocks and lots embrace all that your father had enclosed, that is on this latter portion south of the railroad track, between November 1895 and November, 1897?

A. We did not run our fence in reference to these.

Q. I want to get down with reference to those plots, because the line of your fence is not in evidence.

A. We ran our fence——

Q. (Interrupting.) I just want to know with reference to that plot?

A. With reference to that plot our fence ran from the northeast corner of lot 3, block 12 along the line of block- 13 and 16 of lot 3, block 12, running along the line of block 12 and into block 11, lot 3 and around that line, to the alley in block 14, and then on to the section line and along the section line to Mr. Whitcomb's fence.

Q. Was that all enclosed by your father between November 1895 and November, 1897?

A. All that I have stated, because we had a kind of a brush fence along down the section line to the southwest corner of the forty.

Q. Were you in Clarks Fork when the enclosure was made?

A. Please state when the enclosure was made. Read by evidence and find out the date I said the enclosure was made.

819 Q. Between November, 1895 and 1897 I think. I think you said the fall of 1896 the fence was made?

A. Yes sir, I was in Clarks Fork if I stated that was the fall of 1896.

Q. When were you away from home at school?

A. I left home to go to school first in February, 1898 and remained away until August, 1898.

Q. That was after 1897, then, when you went to school?

A. Yes sir.

Q. Now you know where Jack Catlaw's fence is in Clarks Fork?

A. Yes sir.

Q. State where it is situated with reference to the right of way.

A. Jack Catlaw's fence in reference to the right of way is very near the 200-foot line.

Q. How far from the right of way?

A. It is supposed to be right on the 200-foot line.

Q. Now, how many conversations did you hear between your father and Mr. Edwards with reference to the Edward's building on this land?

A. I heard one, the time we delivered the notice.

Q. Just one conversation.

A. Just one conversation.

Q. And if they had any other conversation you did not hear them?

A. I am doing business at the depot, and I did not hear all of the conversations they had.

820 Q. You only heard one conversation relative to the notice?

A. Relative to the notice I only heard one conversation.

Q. And in this conversation Mr. Edwards said he did not claim the land; if your father wanted it he would not make him any trouble?

A. I did not state that.

Q. I understood you to state that.

A. He said he would make no trouble.

Q. He said he would make no trouble?

A. Yes sir.

Q. You are the son of Mr. John E. White?

A. Yes sir.

Redirect examination.

By Mr. LAMAR:

Q. Mr. White, the first conversation, as I understand it, that you had with Mr. Edwards, your father was not present?

A. The first one I mentioned I had by myself; my father was not present at all.

(The witness at this point requested the stenographer to read the last four questions and answers of the cross examiantion, which was done.)

The WITNESS: I understood Mr. Heitman to mean in the portion of the testimony read the conversation between my father and Edwards; I did not have referen-e to the conversation that Mr. Edwards and I had.

821 Q. You understood Mr. Edwards to state, substantially, that he would not make any trouble, in both instances.

A. Yes sir.

Witness is excused.

JOHN E. WHITE, the contestee, sworn on his own behalf, testified.

Direct examination.

(By the REGISTER and RECEIVER:)

Q. You have been sworn?

A. Yes sir, I have been sworn.

By Mr. LAMAR:

Q. Are you the final homestead entryman in this case?

A. Yes sir.

Q. And you are the same John E. White that testified at the prior hearing.

A. Yes sir.

Q. What is your present post office address?
A. Clarks Fork, Idaho.
Q. Where do you reside?
A. At Clarks Fork, Idaho.
Q. With reference to the forty acre tract mentioned here, where do you reside?
A. I reside south of the railroad track.
Q. On this forty acres?
A. On this disputed forty.
Q. Did you live there between November 27th, 1895, and November 29th, 1897?
A. Continuously, I did.
822 Q. Mr. White, reference has been made to a barn and a blacksmith shop of Gordon Daugharty. State whether or not any part of that building was on the land in controversy on November 27th, 1897?
A. There was not.
Q. Do you remember what has been spoken of here as a small frame building, known as the Roberts residence or servants room?
A. Very well.
Q. State whether or not that building was on part of the land in controversy.
A. That building was wholly upon the right of way of the Northern Pacific railroad.
Q. Save and except the privy, were any of the buildings constructed by Roberts off the right of way and on the land in controversy?
A. The privy was the only building off of the right of way and on the land in controversy.
Q. State whether or not you know of the sale from Roberts to Gordon Daugharty of the buildings etc., on the right of way prior to the consummation of the transaction.
A. I did not and it was a great surprise to me when I learned it.
Q. Mr. White, in the testimony of Jason Edwards, as found on page 120 of the record, it is stated that on that occasion when you served a notice on him not to build a barn, that there followed the following: "Then he (White) told me that I understood the feeling between him and me." Did you say on that occasion, or any
823 other occasion, to Jason Edwards that he was all right in building whatever he wanted to?
A. I did not, otherwise I would not have given him the notice.
Q. On the same page of the record he refers to a later conversation or conversations, as follows: "I met him (White) that evening on the railroad track near the depot, and we got to talking about the townsite, and he told me he had men that was willing to put up twelve thousand dollars the minute he got his decision, to improve the townsite," and on page 121 the following question, "When White told you that he had some parties who would invest twelve thousand dollars in improving this townsite, did he state anything further about the townsite?" A. He told me at that time that inside of a year from the time he got the decision, if he got it, that he would be

worth $75,000." Now Mr. White, state whether or not you ever, at the time mentioned or any other time between November 25th, 1895, and November 29th, 1897, made these statements or any of them, to Mr. Edwards?

A. I made no such statements.

Q. Mr. White, on speaking of his original residence Mr. Edwards said, on page 135 of the record: "Mr. White advised me to move it from the right of way." State whether or not you advised Mr. Edwards to construct any buildings on the land in controversy?

824 A. I did not, and the statement is utterly false.

Q. On page 136 of the record occurs the following, in the testimony of Mr. Edwards: Q. "When Mr. White advised you to remove the buildings from the right of way, what did he say? A. He told me that he had wired to Missoula and they had told him I better not build on the right of way and he started and walked away or about half way to the railroad track, about one hundred or one hundred and fifty feet from where I was and turned around and spoke to me and told me to come where he was, and I went where he was and he told me to move back off the right of way onto them lots." Did you state to the witness on this or any other occasion that he might move back onto your land?

A. I did not.

Q. Mr. White, it has been sought to introduce testimony in this case relative to an alleged contract in writing between you and Mr. George Roberts, based upon his assisting you, and whereby and whereunder it is claimed you were to give him some advantage of preference relative to the land in controversy. State whether or not you ever had any such agreement, either written or oral, with Mr. Roberts?

A. I never had such an agreement, either written or oral, and these affidavits are perjuries.

Q. Did you ever have any agreement whatever with Mr. Roberts concerning the land in controversy?

A. None whatever.

Q. Or any part of it.

825 A. No sir, no part of it. I may state that there was no occasion for any agreement because Mr. Roberts admitted to me often and many times that he considered my right the best there and that if I won out that he would never make me any trouble: that he would peaceably surrender everything to me that belonged to me that belonged to me on the disputed forty.

Q. Do you remember whether or not you were on speaking terms with Reuben Johnson on May 1, 1897?

A. I distinctly remember that I was not upon speaking terms with Reuben Johnson at that time.

Q. Do you remember the incident to which your son testified this morning?

A. I do.

Q. State whether or not that occurred prior to May 1, 1897.

A. Well, it occurred—I don't remember the exact date—yes, I can remember it was prior to May 1st, because the grass had just

begun to grow. I should like to make a little further statement, that from that date to this I have not spoken to Reuben Johnson.

(By Mr. GRAHAM:)

Q. You mean the day of this conversation?
A. The conversation reported by Compton White.

(By Mr. LAMAR, resuming:)

Q. Did you hear the testimony of Mr. George Roberts on yesterday?
A. Yes sir.

Q. State whether or not you recall having spoken to Reu-
826 ben Johnson prior to April 5th, 1897, on the subject of your claims to the land in controversy?

A. Yes sir.
Mr. HEITMAN: Between when?
Q. Subsequent to 1895 and prior to April 5th, 1897?
A. Yes sir.
Q. State as nearly as you can, the substance of what you said to him.

A. Well, during most the whole of the time embraced within this period Reuben Johnson was a customer of George Roberts. George's place of business was just across the way from me. I was at that time agent for the Northern Pacific railroad company, and I was frequently at George Roberts' place of business. On those occasions I met with Reuben Johnson I should say once or twice a week, and the townsite was frequently discussed and my homestead, and Reuben Johnson told me, in the presence of George Roberts, that he was going to build on the land, or intimated that he would, and he also went on to state that he had a brother, who was in one of the departments at Washington, D. C., whose advice he had asked regarding those town lots, and that he had been instructed by his brother that he would have a perfect right to build on that land. On such occasions, which I think occurred a number of times, I told him that if he built on that land that I would hold his buildings, that that was

my homestead, and it was well understood by Reuben John-
827 son that it was my homestead, and he was familiar with the case, with the former contest, and knew that the land was then in controversy. He seemed to rely a good deal upon what his brother had said to him.

Q. You heard the testimony of Mr. Johnson relative to his alleged conversation with you on the railroad about May 1, 1897, in which it is claimed you dissuaded him from building on the south side of the railroad. State whether or not you ever at any time had such a conversation with him?

A. I never had such a conversation with him, or anything else from which he could infer that I would allow him to build on any portion of the land.

Q. State whether or not, on the parcels of land now embraced in an enclosure as made by Mr. Johnson north of the railroad track, in what is designated on a plat as being a part of block 3, according to

the alleged townsite subdivision, there were any improvements made on Reuben Johnson whatever prior to or on November 27th, 1897?

A. There were none.

Mr. HEITMAN: That is on those seven lots?

Mr. LAMAR: Yes on those seven lots.

Q. State whether or not Mr. Johnson ever specifically mentioned to you any claimed interest on his part in any of the improvements as constructed within the enclosure around the March residence.

A. He did not; I always considered that March residence as belonging to Tom March.

Q. State whether or not you gave any notice or warning to
828 Mr. March with regard to that residence?

A. I did.

Q. When and where and what?

A. Well, I think it was on the occasion when Tom March came to the depot to buy a ticket and he told me that he expected to get a little house that sat there where Foreman's is, or close to Foreman's, in payment for helping Foreman move the Greenough-Bradock buildings over to those buildings that Foreman had bought from Butler, and that he had no place to put the building, but that he was going to put it back on one of those lots—that is the expression that he used—that he was going to put it back on one of those lots, and he went on to explain to me that he considered my rights, or he did not—he knew that I had a claim on the lots, and that if I won out and got my patent, that he would make me no trouble, but that he had to do something with the house, make some disposition of it, and that he would shift it back on these lots. I then told him that I would have to give to him the same notice that I was giving everybody else, and that if he put that building upon my ground that I would hold it when I got my patent.

Q. Did you there after conference with Mr. March, or any of his successors, modify your position with regard to that building?

A. No sir, that is the same as I gave all of them, and some of those notices are of record, and I am careful to put them in the strict expression covering the case.

829 Q. You heard Mr. Carpenter Wilson's testimony here?

A. I did.

Q. Prior to any clearing or other improvements on the land, had you made known to Mr. Wilson the nature of your claim to this land?

A. Very frequently.

Q. Now, as to Walter Fleming, before he built on this land had you talked with him about it?

A. Walter Fleming and I had frequent consultations, and he understood the exact situation, and he knew what he was doing when he built that house there; we had had frequent conversations about it, in one of which my claim to the entire 160 acres there was asserted.

Q. Did you ever grant him any permission to build there?

A. Never.

Q. Did you ever grant Schindler any permission to build there?

A. Never granted him any.

Q. As a matter of fact, how far was Schindler's house moved? Mr. Nagel said it was moved off his homestead. How far was it moved?

A. I can't state exactly, only I know it was moved so quick that I didn't know anything about it, just across the line; had to move it from Nagel's ranch over to my ranch, just barely across the line. It was done before I knew anything about it.

Q. Had Mr. Schindler understood your claim before it was
830 done?

A. I don't see how he could help it; he was Mr. Nagel's brother in law and knew about it and signed the original townsite petition and I don't know how he could help knowing it. A man must be a fool or blind that would not know everything about that in that country.

Q. You heard your son's testimony?

A. I did.

Q. Do you remember the incident relative to Mr. Hutton applying to you for permission to build?

A. Perfectly well.

Q. State whether or not you gave him any warning before he built.

A. I warned him that that land was in controversy, and that I would hold his buildings if he put it on any part of my land.

Q. This was before he put any buildings there?

A. Before he built anywhere.

Q. Mr. White, before Mr. John S. Foreman bought the Butler building from Whitcomb Brothers & Nagel, did you warn him against acquiring any interest in this building he had built?

A. Yes sir, I did.

Q. After he bought them, and before any additions thereto were erected, state whether or not you gave him any additional warning.

A. I did.

Q. State whether or not you ever, directly or indirectly, gave Mr. Foreman any permission to, or assurances of protection, on
831 account of the purchase or addition to the buildings known as the Butler buildings formerly?

A. I never did.

Q. Mr. White, between November 27th, 1895, and November 29th, 1897, did you ever authorize or empower any one to place any townsite improvements on the land in controversy?

A. I did not; made many enemies by warning them all not to put their improvements there.

Q. Mr. White, in one of the affidavits of record there is one, at least, if not more, signed by Mr. Alfred Derr. State what, if any efforts you made to secure the attendance of Mr. Derr as a witness at this hearing?

A. I will state that I asked, persuaded and finally begged Al. Derr to come and substantiate his affidavits. He has given me his reason for not being able to come, that he had joined an order, I don't remember whether he said what order, that Edwards belonged

to, and he could not come for that reason, but that he would look over the by-laws and see whether it would be consistent for him to come or not. I asked him afterwards, and on this occasion I tried to persuade him to come, and he told me that he could not come, for the reason that there was only one store in Clarks Fork, and that store was now carrying him—he used the word "carrying" him, and if he came down Mr. Whitcomb would cut his account short and make him settle; that if there were two stores it would be different. I finally after your (Mr. Lamar's) arrival in Clarks Fork managed to get him to the house where you were and let him state the necessity before you of his coming and substantiating his affidavits. You told him on that occasion that in all time to come in this record that perjury would go down, and that you wanted that perjury put where it belonged, and that if he had made those affidavits he should come and substantiate them, and he then promised us that he would come that evening and let us know at seven o'clock whether he would come or not, and he came and said that he would not go, that he had to choose between the less of two evils, and he would take the least.

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(Recess until 1 o'clock.)

Hearing resumed at 1 o'clock p. m.

Present, same parties as before.

Thereupon the following proceedings were had, to-wit:

JOHN E. WHITE—direct examination resumed:

By Mr. LAMAR:

(Here the last question and answer were read over by the stenographer.),

The WITNESS: Would it be proper for me to amend that?

Q. Finish the answer.

A. One of the reasons I omitted to state, and that was that he reminded me that at the time I got my decision of May 23, 1899, he went with me to point out the various houses, and the general situation of the townspeople's houses there, and after we got through he stated—M. P. Whitcomb got him by the arm and pulled him into his store and said, "I want you to settle your account." "Now," he says, "you know that if he wanted me to do that then, of course he would want me to settle now," or words to that effect; I don't remember the exact words, or at least I may have omitted some of the words.

833

Q. Mr. White, at the prior hearing you, if I remember correctly you went into the clearing of your land which had been done up to that time south of the railroad and east of the county road. Since November 27th, 1895 and prior to November 29th, 1897, had you cleared, enclosed or cultivated any of the land south of the railroad in the forty and west of this county road?

Contestant objects to this question as being immaterial and irrelevant, for the reason that White's occupancy or improvements on any

part of this land in controversy between November, 1895, and November, 1897, are not in issue at this hearing.

Objection sustained.

A. With the exception of a little slough I have cleared and cultivated all of the land embraced in this forty south of the railroad track, excepting public roads, about an acre, that Mr. Whitcomb's garden encloses, and the right of way.

Cross-examination.

By Mr. HEITMAN:

Q. On what blocks and lots, as marked by contestants Exhibit A on the former hearing, did you clear and cultivate land be-
834 tween November, 1895 and November 1897?

A. South of the railroad you mean, don't you?

Q. Yes.

A. Well, I will say that in order for me to locate that ground it would be necessary for me to look at a plot that myself and son drew in reference to that ground, but I am not familiar enough with that plat, not having recognized any townsite lots, to say.

Q. Look at your plat; testify, though, from that plat (Contestants Exhibit "A")

Mr. LAMAR: This is not prior to 1897, between November 1895 and November, 1897,

A. All of the land on the south side embraced within the townsite plat, excepting lots 4, 5, 6, 7, 8, 9 and 10, all of what is marked as Division street.

Q. Lots 4, 5, 6, 7, 8, 9, and 10, in what block?

A. Block 11, and a small part of lots 4, 5, 6 and 7 in block 14 and Division street west of the east line of lot 4 in block 11 and lot 4 block 14, that is all the land as I now remember it.

Q. Can you locate the time when Al Derr claimed to have the conversation with Whitcomb, which you have just detailed?

A. I will say in the month, as near as I can come to it, within a month of it, and I will say it was in the early part of June, 1899. I know it was immediately succeeding my decision, which was given the 22nd day of May, 1899, and it was the early part of June.

Q. Where does Alfred Derr now live?

835 A. Alfred Derr lived on a homestead claim about two miles east of Clarks Fork.

Q. What county and state?

A. County of Kootenai, State of Idaho.

Q. Now you state that you made many enemies by warning them off the land in controversy. How many enemies did you make thereby, Mr. White?

Mr. LAMAR: We object to that question as not being relevent to the issue.

Objection overruled.

A. I don't know how many enemies.

Q. Are any of those enemies living in Kootenai county at the present time?

A. I think they are all living at Clarks Fork.

Q. Did you make any effort to bring any of those men here to testify that you had warned them off?

A. Well I know by the information I had in Kootenai that it would be no use.

Q. You made no effort to get them to come?

A. I knew it would be useless.

Q. Then you made no effort, Mr. White, that is the question?

A. I made no effort, for the reason stated.

Q. Now, you say you wanted Mr. Foreman before he bought the Butler building and made additions thereto, not to buy or make additions to those buildings; I believe you stated that, Mr. White?

A. I have stated that I warned Mr. Foreman not to buy those buildings, both before he bought them and after he told me that he had bought them.

836 Q. Did you give him any written notice?

A. I don't remember that I did.

Q. Did you give Hutton any written notice not to build or make improvements?

A. I think not.

Q. Did you give Fleming any written notice?

A. I don't remember that I did.

Q. Now, when Carpenter Wilson was building his fence around the lots that he did fence in 1897, did you know that he was making these improvements?

A. I did.

Q. Did you give him any written notice?

A. Carpenter Wilson and I had repeated talks, in which I warned him not to go on that land, and he was thoroughly familiar with the situation.

Q. Did you give him any written notice?

A. I don't remember that I did.

Q. You say you warned him. Now what did you say to him, Mr. White?

A. Well, sir, Carpenter Wilson and I had a number of talks, I don't remember at any particular time or place, but I told him that I would own that whole place before this litigation was settled.

Q. Did you tell him not to put any improvements on it?

A. I told him that if any one built there I would hold their improvements; I did not warn him at the time specially.

Q. Did you give any written notice to Tom March
837 not to build?

A. I did not, but I had a talk with him, in which I gave him fair warning that I would hold his building if he got them on that land.

Q. Now, I believe you stated that there were no improvements of any character on those six or seven lots, that Johnson claimed, prior to November 1897. Is that correct?

A. That is my evidence, I think.

Q. Had Johnson made any clearing on these lots, or any of them prior to November, 1897?

A. He had not.

Q. You were quite sure of that?

A. I am as positive as a man can be who sees the ground almost daily.

Q. Now you stated in your examination in chief, that you frequently met Reuben Johnson's place of business, and that Johnson told you that he intended to build on the land in controversy. Now, when did those conversations take place, about when?

A. I can state them only as near as I can remember, but I can't be accurate in the dates, because I made no note of it.

Q. No, I don't expect you to be accurate?

A. But they took place in the year 1895, in the year 1896 up to the latter part of 1896, as I remember.

Q. When was the last conversation you had with Mr. Johnson?

A. About the latter part of 1896 or maybe it might be the first of 1897.

838 Q. How often did Mr. Johnson tell you that he intended to build on these lots in controversy?

A. I can't tell the exact number of times, but every time Tom Johnson came over he would bring the subject up. I met him very frequently at Roberts place there, and he and George Roberts were very good friends, and he would talk about it.

Q. Johnson eventually did make improvements on this land in controversy?

Mr. LAMAR: We object, as the improvements made by Johnson have been shown to have been subsequent to November 27, 1897.

Objection overruled. Exception allowed.

A. Yes sir.

Mr. LAMAR: We ask that improvements made subsequent to November 1897 be excluded from this record.

Motion denied.

A. Yes sir.

Mr. LAMAR: I ask to have the question amended before it is answered.

The REGISTER and RECEIVER: Let the witness answer it.

Mr. GRAHAM: We ask the register and receiver to confine him to 1897.

Mr. LAMAR: We ask the witness to confine his answers prior to 1897.

The WITNESS: Not between the period from November 1895 to November 1897.

839 Q. Did not Johnson build an addition to the March house between November 1895 and November 1897.

A. If he did I did not know it.

Q. He might have done so and you not know it?

A. I have understood and have always been under the impression that Tom March made those improvements.

Q. Now you say you were greatly surprised when you first learned that George Roberts sold out his holdings at Clarks Fork to Gordon Daugharty?

A. I did.

Q. Why were greatly surprised?

A. At the turn business had taken there and I not knowing anything about it.

Q. Why should they have taken you into their confidence before they made this sale?

A. I don't claim they should have.

Q. Then why were you greatly surprised at the turn things had taken and you not know anything about it?

A. The event in itself surprised me.

Q. Why?

A. For several reasons, just as you be surprised at the death of a friend or anything else.

Q. You say Roberts' old privy was off the railroad right of way?

A. I did.

Q. Where was the pump?

A. Well, there were two pumps, the kitchen pump and one that was put there for emergencies.

840 Q. That was the fire pump, fire extinguisher?

A. Yes sir.

Q. Where was the fire department?

A. I am not positive where it was, but I have always been under the impression from my memory that it was on the disputed forty or about on it.

Q. You don't know how far back on the railroad right of way?

A. Well only in reference to this residence house or servant's house of Roberts; I know it was a little piece back of that, whether it was just eight or six or ten feet I could not say; I know it was just back a little piece.

Q. Where was Roberts' orchard situated?

A. Robert's orchard was situated back of his store and the hotel building and saloon.

Q. That was off the right of way?

A. I don't think any of them was on the right of way.

Q. Now, do you know how far the lots that were laid off in Nagel's townsite, about which evidence was introduced on the former hearing and as shown in contestant's Exhibit D on the former hearing—how far the front of these lots was from the center of the railroad track?

A. How far the front of it was?

Q. Yes sir.

A. I don't know; I could not say under oath.

Mr. LAMAR: We object to that because the matter to which Mr. Heitman refers was long prior to this controversy or to the

841 scope of this inquiry and relates to something about which this witness was not questioned on direct examination, and

assumes familiarity on his part with a plat which is not exhibited to him.

Objection sustained. Contestant excepts.

Mr. LAMAR: We ask that counsel make the witness his own witness for that and pay for it.

Motion denied.

Q. Mr. White, you know where Jack Catlaw's fence is or was between November, 1895 and November, 1897?

Mr. LAMAR: Attention is called to the fact that this witness was not examined relative to this point, and notice is given that his answer will be considered as the answer of his own witness on this subject.

Mr. HEITMAN: That is for the register and receiver to say. I want it understood that he is not my witness.

The REGISTER and RECEIVER: I don't know how I can rule on that.

Mr. LAMAR: I object to the indefiniteness of the question as it does not say what part of Jack Catlaw's fence, nor where.

Q. You know where Jack Catlaw's fence is or was between November, 1895 and November, 1897 with reference to the railroad right of way?

A. It was supposed to be right on the line of the right of way and the 200 foot limit.

Q. Do you know of your own knowledge that this fence was right on the line of the right of way?

842 A. Within a few inches, I do.

Excused.

Mr. LAMAR: Mr. Eplin desires to make an explanation in regard to his testimony. On page 30 on cross examination he was asked this question. "Q. Was any one present when you had this conversation with Mr. Whitcomb about the contents of the affidavit you made in this proceeding."

Mr. EPLIN recalled on part of contestee.

By Mr. LAMAR:

Q. Now Mr. Eplin, is there any further explanation you desire to give to your answer to the first question on cross examination, which reads as follows: "Was any one present when you had this conversation with Mr. Whitcomb about the contents of the affidavit you made in this proceeding? A. No sir, not that I know of; if there was anybody present I did not see them."

A. We had no conversation about the contents of that affidavit. That is the correction I want made.

Mr. GRAHAM: Tell what the conversation was about?

A. The conversation was about signing an affidavit.

Q. Mr. Eplin, after refreshing your recollection on the subject, did you have more than one conversation with Mr. Whitcomb in

connection with your affidavit; if so, state what other conversation you had than that you mentioned?

843 A. I remember of another conversation with Mr. Whitcomb and I think in the evening in Mr. Whitcomb's store; there were Whitcomb, if I am not mistaken, John Lloyd and Reuben Johnson present and the subject was brought up of the townsite and matters in general was talked about, and this question of affidavit was brought up, and I stated in the presence of those three men that I did not know at the time I signed this affidavit but what I was compelled to act as a witness in this case.

Q. What, if anything, was said by Mr. Whitcomb on that occasion, if you recall?

A. Mr. Whitcomb said that the witness did not have to serve on a land contest, it was not binding on a witness on these contests, and I think that is the reason I said that I did not know but what I had to serve as a witness.

Q. The occasion to which you referred to in which Mr. Whitcomb had a conversation about your coming down here, is it?

A. No sir.

Q. Mr. Eplin, will you state whether or not you ever had any other conversation with Mr. Whitcomb in regard to Mr. White about this contest than these two, with respect to which you have already testified?

Mr. HEITMAN: I object to reopening the whole case with this witness.

Objection overruled.

A. Well, yes we have had different conversations, that is I remember one more conversation.

844 Q. Where was it?

A. That took place in my room.

Q. Go ahead and state what it is and what time?

A. This was in 1899.

Mr. HEITMAN: I object to any conversation that took place in 1899.

Mr. GRAHAM: It relates to those affidavits.

The REGISTER and RECEIVER: I sustain the objection. It is not within the scope of the inquiry.

Mr. HEITMAN: I object to it because clearly not within the date called for.

The REGISTER and RECEIVER: I will allow the question to be answered and put a summary stop to the examination. I sustain the objection.

Q. Go on and state the balance of the answer about what the conversation was.

A. The subject was brought up I don't remember just how it was brought up, of the disputed townsite question, and Mr. Whitcomb said that, "I must say for John E. White that he had not sworn to any thing false in all this contest."

Contestee rests.

Contestants' Rebuttal.

M. P. WHITCOMB recalled in rebuttal.

Direct examination.

By Mr. HEITMAN:

Q. You heard the evidence of Foster and Brown as to the cost of Whitcomb Brothers and Nagle's store building. Will you
845 state whether or not that building had been completed in November, 1895?

A. Yes sir; I think it had; in fact I know it had.

Q. Can you state, in detail, the actual cost of that building when completed?

Mr. LAMAR: I object to that. Now he is going into something not brought out, which he had an opportunity to examine the witness about, the value of these lands and of this particular building. This witness specified his valuation upon this property. We submit he can not go in to and rehearse his own testimony brought out in chief.

The burden was on him to show the value of this property. He made a showing. Now, excepting as to something brought out on cross examination by us that is new, I think this testimony is clearly incompetent.

Mr. HEITMAN: Now, I desire to show by Mr. Whitcomb, in rebuttal of Mr. Foster's evidence, that the cost of this building must necessarily have been much greater than the value which either Foster or Brown placed thereon.

Objection overruled. Exception taken.

Q. Be as brief as you can and tell the cost of that building, November, 1895?

Mr. LAMAR: I object.

Objection overruled. Exception taken.

A. I have made a detailed estimate on the cost.

Mr. GRAHAM: We will object to his submitting any estimates on buttal here unless the estimates were made in 1895, and at
846 the time that this building was constructed. This is surrebuttal; it is not part of his case at all.

The REGISTER and RECEIVER: I am allowing Mr. Whitcomb's testimony in rebuttal of Mr. Foster's and the objection is overruled on that ground.

Q. Now go on and be as brief as you can.

A. The main store building is 24x50 two stories high with a ware house 16x24, with a roof in the rear of the main building one story, with a shed roof which covers the cellar beneath the ware house, the woodshed and oil room is 12x16 attached to the main building on the west side, one story high with shed roof.

Q. Go ahead Mr. Whitcomb.

A. The rough lumber and dimension material in this building is 11,500, at $9 a thousand, would be $103.05; of sheet lumber, surfaced one side for out side and inside sheeting is 7000 feet, at $11, would be $77. Sheeting lumber surfaced one side for flooring 300 feet, $14.30. Rustic siding of the main building, ware house and woodshed is 4800 feet at $20 a thousand, $96. Matched flooring for main building, ware house, is 3700 feet, at $22.50 would be $83.25; matched ceiling and wainscoating, 4000 feet, at $22.50, would be $90. Finishing lumber for finishing and fixtures, 4500 feet, at $20, would be $90. 2300 shingles at $1.60 would be $36.80.

(By Mr. LAMAR:)

Q. What are the dimensions of that cellar?

A. 16x24.

Q. Depth?

847 A. 8 or 9 feet, I forget which it is; it is of cement. Timbers for foundation and foundation for the main building cost $100. Nails and hardware $125. Store front doors and windows, $200. Material and labor for building, brick chimney $50. Paint, oils, varnishes, etc., $125. Carpenter work, including the painting of the building, $900. Total $2590.85.

(By Mr. LAMAR:)

Q. The carpenter work, is $900?

A. Yes sir, and it will go above that.

Q. What is the total?

A. $2590.85.

Q. Mr. Whitcomb, you heard Mr. Brown's evidence, in which he stated as follows: "I had a conversation with Mr. Whitcomb in regard to clearing some land to build his house on. I told him at that time I could not promise to clear the land. Afterwards I met Mr. Whitcomb. I told him I did not want to clear the land, for two reasons, one that I had not time and one that I thought he was getting on the land that would be embraced in White's homestead entry, and White had told me that if he got on that land that he would certainly hold the land and everything on it." Did you have any such conversation with Mr. Brown?

A. No sir, never at any time.

Q. Did you make any effort by word or act to prevent Al Derr from appearing as a witness on this hearing?

A. No sir, most emphatically no.

Q. You have heard the evidence of Mr. Eplin as to three

848 separate conversations with you with reference to the signing of the contents of the affidavit which he signed and which was used before the department in the proceedings. State how many conversations you had with Mr. Eplin relative to the matter?

A. Only one.

Q. Who was present when you had that conversation with Mr. Eplin?

A. Mr. Reuben Johnson and Mr. John Lloyd were in the store, and think they heard every word that was said.
Q. Will you state what Mr. Eplin said on that occasion.

Mr. LAMAR: We object to this conversation because the matter was gone into in the direct examination of Whitcomb and Mr. Whitcomb's affidavit was read to him.
Objection overruled.

A. It was in substance that he had signed a paper that Mr. White had drawn up and that he did not know the contents of said paper, he had never read the paper, himself, nor had Mr. White read it for him.
Q. Who was present when this conversation took place if any body?
A. Mr. Reuben Johnson and Mr. Lloyd.
Q. You have heard Mr. Eplin's corrected evidence today in which he stated that you told him at his house that you would admit that John E. White through all this controversy had spoken nothing but the truth. State whether or not you made any such statement to Mr. Eplin?

849

Mr. LAMAR: I object to the question because it does not accurately state the testimony.
Objection overruled.

Q. Spoken or written nothing but the truth?
A. No sir. I don't remember of any such confab at all.
Q. State whether or not Mr. Whitcomb between November, 1895, and November, 1897, Mr. Hasselroth and his family up there gave up their residence in Clarks Fork.

Mr. LAMAR: I object to the question because the matter was gone over fully by this witness in his examination in chief.
Objection overruled.

A. No sir, I will say not.

Cross-examination.

By Mr. LAMAR:

Q. Mr. Whitcomb, you live in the same community with Mr. Eplin, do you not?
A. Yes sir.
Q. What reputation does Mr. Eplin bear in your community as a man of truth and veracity?

Objected to as immaterial and irrelevant and not proper cross examination; furthermore, the counsel has no right to ask the opposing side the character of witnesses who have sworn against him.
Objection sustained but answer is not excluded.

850 (Question read.)

Mr. HEITMAN: I object as not being — question; it not having been shown that Mr. Whitcomb knows Mr. Eplin's character.

Q. How long have you known Mr. Eplin?
A. Since 1895; I think 1895.
Q. Since 1895?
A. I think so.
Q. Since that time has he been a peaceable citizen? You have known him since 1895.
A. Yes sir.
Q. What do you know of Mr. Eplin's reputation in that community for truth and veracity?

Mr. HEITMAN: You understand, Mr. Whitcomb, what a man's general reputation for truth and veracity is. It is what the people in the community generally say about it; not what any one individual says about it, or what he may say about himself, state first whether you know it or not.

Q. (Question repeated.)
A. It has always been fairly good so far as I *am* have known.
Q. Is he not recognized as a God fearing man in that community?

Mr. HEITMAN: He has answered the question. I object to any examination on this line.
Objection sustained.

Q. Mr. Whitcomb, this conversation which you had with Mr. Eplin with regard to that affidavit, are you certain that there
851 could not have been any mistake as between you and Mr. Eplin as to what Mr. Eplin intended to say?
A. I don't think there could have been; it was spoken of very plainly; I don't think I could have been, as it was spoken very plainly.
Q. Will you give his words?
A. I think I have already given the words.
Q. Give them again please?
A. That I asked Mr. Eplin if he had made an affidavit for Mr. White. He stated that he had signed the paper for Mr. White, but that he did not — the contents of the paper, that he had never read the paper, neither did Mr. White read it for him; he merely put his name down where Mr. White told him to.
Q. May he *did* not have used simple words calculated to keep from telling what the contents were rather than stating that he did not know the contents?
A. I did not take it that way; I took it just as I said; that is the way I took the meaning.
Q. Might not his words have been construed—misconstrued by you in that particular?
A. I think not; I don't see how they could have been well misconstrued.
Q. After this Mr. Whitcomb, did you visit Mr. Eplin?
A. I think perhaps—I don't know whether I have been in Mr. Eplin's house since or not; I could not say as to that. Mr. Eplin and I have always been——
Q. (Interrupting.) Have your families and his interchanged visits since?

DARK PAGE

852 Objected to as immaterial and irrelevant.
Objection sustained and answer excluded.

Q. Since that time have you not been on friendly relations with Mr. Eplin?

Objected to as immaterial and irrelevant and improper cross-examination.

A. Myself?
Q. Yes.
A. Comparatively, yes sir. Mr. Eplin trades at our place of business and has been trading there right along I never have said anything to him about this one way or another since.
Q. What time of day did this conversation occur?
A. I think about noon, somewhere, along in the afternoon, Mr. Eplin came into the store.
Q. Where?
A. At our place of business in our store.
Q. What place in the store?
A. I think I was sitting at the desk when Mr. Eplin came in; I don't remember whether he sat down or not.
Q. Whether- was Lloyd and this other person—where was Reuben?
A. He was there in the store.
Q. Right by you?
A. I think down by the stove.
Q. How far is that stove from your desk?
A. Something like 20 feet.
Q. Was Mr. Eplin talking loud or low?
A. In the usual tone of voice.
853 Q. Does he usually talk loud or low?
A. Well, I should say medium; it is neither one nor the other.
Q. Mr. Whitcomb you will not deny that you have been to Mr. Eplin's house since this occasion, will you?

Objected to as immaterial and irrelevant, as he stated there was no break between them.
Objection sustained.

Q. Did you ever go to Mr. Eplin's house after this time?

Objected to as irrelevant and immaterial.
Objection sustained.
Mr. HEITMAN: I ask that the answer be excluded.
Request denied.

A. Yes sir, I have been there repeatedly.
Q. Subsequent to this matter?
A. Yes sir, delivered a great many groceries at their place, carry a sack of flour or something there.
Q. And your opinion of him has not been lowered by his signing an affidavit that he did not know the contents of?

Mr. HEITMAN: I object.
Objection sustained.

Q. Now, is Mr. Al Derr indebted to you at this time?

Objected to as immaterial and irrelevant; the witness has stated that he made no effort to keep Al Derr from attending this court.

Thereupon a recess was taken to 7:30 o'clock p. m. at which time the hearing was resumed, with the same parties present as
854 before, and the cross-examination of the witness on the stand, Mr. M. P. WHITCOMB was resumed as follows:

By Mr. LAMAR:

Q. Was Mr. Al Derr indebted to you at the time referred to in the testimony of Mr. White?

Objected to as immaterial and irrelevant.
Objection sustained.

By Mr. GRAHAM:

Q. Mr. Whitcomb, the several items of lumber which you gave as being used in the construction of this building put together, I think amount to some 36000 feet. Will you state what is the usual price per thousand feet, putting lumber into and erecting a building such as your store was in 1895 and 1897?

A. No I don't think I could state what it would be worth a thousand feet.

Q. Is it not a fact that $6 a thousand for putting rough lumber into such a building as yours is good fair price; I mean for the labor?

A. I don't know as I think that; I could not answer it.

Q. In your estimate for this cellar you place the cost at $500. Will you please tell us the number of cubic yards in the walls of that cellar or floor that was used there and the estimate of your price per yard for laying the cellar. I believe you estimate the price of putting the cellar in at $500?

A. Yes sir that is about what it cost us to put it in there.

855 Q. I will ask you the number of yards?

A. Well that I don't know that I can figure; I don't remember the thickness of the wall. I made my estimate simply from the cost of doing the work, my books show it.

Q. Did the wall exceed 12 inches in thickness?

A. I think something like two feet.

Q. Was that two feet all cement, or was it rock faced with cement?

A. It was rock lime and cement.

Q. In your estimate of the shingles on this building, you fix it at 23,000. Will you state please what it is worth per thousand to lay shingles on such a building as this, or what was it worth when the shingles were put on?

A. Well, that I could hardly estimate with the class of men what we had to work with, it was such that they would not lay those shingles as cheap as good carpenters would lay them.

Q. Is it not a fact that $1.25 a thousand is a fair price and the going price for laying shingles?

A. Well something like that.

Q. Now Mr. Whitcomb, you say the timber in the foundation of this building came to $100. Will you please describe the dimensions and the number of the timbers in the foundation?

A. I don't know that I said that the timber in the foundation amounted to $100; if I did I erred, because they did not. Said that the timber and the work of leveling ground and ect.,
856 amounted to about $100.

Q. Now how long is the chimney in this house?

A. I think 31 or 32 feet.

Q. You estimate the price of that chimney at $50. It is a fact is it not that a dollar a foot is a fair price and higher than the usual price for building flues in the vicinity of Clarks Fork?

A. No, I think not in that case it is a large chimney. I made the estimates what I thought was fair and reasonable. Mr. Nagel assisted me in making the estimate and we put it at what we thought was fair, reasonable compensation, nothing exorbitant or out of the way.

Q. You don't know it is a fact that a dollar is going price in all of this country for chimneys—a dollar a foot I mean?

A. It would depend a good deal on what your material cost you. In Clarks Fork the freight on the brick is consider-ble more than the price of the brick.

Q. Now, with reference to this lumber, Mr. Whitcomb, is it not a fact that the lumber in this building was manufactured in the mill owned by Whitcomb Bros. & Nagel at that time?

A. Yes sir.

Q. At that time what did you pay for logs per thousand feet?

A. I would state that our estimate was made on——

Q. Just answer my question. We will not get into any argument over it?

857 A. $3.50 or $3.75 per thousand.

Q. $3.50 or $3.75 per thousand board measure?

A. Yes sir.

Q. What was the average cost of manufacturing a thousand feet of lumber in that mill, rough lumber?

A. It is about the same as the price of logs; something like that.

Q. Is it not a fact Mr. Whitcomb, that those logs can be manufactured into rough lumber in a mill such as you say you had at Clarks Fork at this time for two to two dollars and a quarter a thousand?

A. What do you mean, just rough lumber?

Q. Just rough lumber.

A. Something like that I suppose.

Q. Now to make this rough lumber into dreess-d lumber, will you tell us what would be the cost of that?

A. Somewhere from a dollar to a dollar and a half a thousand.

Q. Then $3.75 for the logs and $2.25 to saw would amount to $6 for the rough and a dollar and a half for dressing to $7.50 per thousand for the dressed lumber, the actual cost to you, would it not?

A. Yes something like that.

Q. Then from your estimate here I find eighteen thousand and some feet of dressed lumber at $7.50 per thousand, and about eighteen thousand feet of rough lumber at $6 per thousand. Is that the actual cost to you, of the lumber in that house?

A. No it would not be; that lumber has to be sorted over
858 a good deal to segregate the common lumber from the finishing lumber, which makes an extra cost on the finishing lumber.

Q. Now then would you give us an estimate of what the cost of sorting that lumber would be per thousand?

A. Perhaps something like a dollar a thousand.

Q. A dollar a thousand?

A. I don't know whether that would cover it or not.

Q. That would make 18,000 feet at $8.50 per thousand, would it not; it would make the dressed lumber $153 and 18,000 of rough lumber at $6 would make $108; in all $261. In your estimate on your examination in chief I find that you have rated this lumber at $689.75 more than it actually cost you; is that a fact Mr. Whitcomb?

A. Well, I would not say as to the cost, whether my estimates are correct or not; I am not a mill man and——

Q. Your estimate of the cost of lumber, the price of the logs and the manufacture and the sorting is about correct, is it not?

A. Well, as near as I recollect, yes something.

Q. Now I will say to you, Mr. Whitcomb, if it is not a fact that $10 per thousand for rough lumber constructed and put into a building similar to your store is a fair average and a good price for the construction of the same in Clarks Fork in 1895 or 1897?

A. Well, no, I would not consider it so at that time. The
859 estimate that I made on the work of that building is actual cash paid out or its equivalent to men working on the building.

Q. Now, will you kindly give us the average wages paid carpenters for a day's labor of ten hours during the time of the construction of this building?

A. I think I paid $3 a day; there may have been some of them we paid a little more than that and some we paid less, but our books verify my statement in regard to the cost of the building.

Q. Now Mr. Whitcomb, do you think that your estimate of $200 for hardware and nails is a reasonable estimate for construction of such a building as you had at Clarks Fork in 1895 and 1897?

A. My estimate on hardware was $125 the $200 was for store front, doors and windows.

Q. I beg your pardon. I will ask you with reference to that store front, the size of it?

A. It is 12x24, the glass part of it. That also includes the windows, doors, etc., of the building, $200.

Witness excused.

GORDON DAUGHARTY, recalled on behalf of contestant, in rebuttal.

Direct examination.

By Mr. HEITMAN:

Q. You heard Mr. Roberts' evidence yesterday about the value of the property that you bought from him April 5th, 1897 at Clarks Fork. Wil you state what was the value of the stock of
860 goods which you bought from him. Now go ahead, Mr. Daugharty?

A. About a thousand dollars.

Q. What was the value of the hotel furniture that you bought?

A. About $150.

Q. What was the value of the other property, outside of the building that you bought?

A. About $300.

Q. What value did you and Mr. Roberts put upon the buildings in this trade?

Mr. LAMAR: We object to that, because the written evidence is the best evidence as to the value placed on it.

Objection overruled. Question withdrawn.

Q. What value did you place upon the buildings in making this trade?

A. I placed about between twelve and fourteen hundred dollars on it.

Q. In this bill of sale it is said "that the said Gordon Dougharty is to pay all outstanding bills which may come against said business house." State whether or not you paid any bills against Roberts' house, the business of Roberts himself?

A. I paid $450.

Q. How much if any thing, did you collect out of the book accounts?

Objected to as not proper rebuttal. Overruled.

A. About the same.

Q. What same?

861 A. About between $450 and $500.

Cross-examination.

By Mr. LAMAR:

Q. Mr. Daugherty, how many rooms were there in that hotel furnished?

A. There were twelve rooms.

Q. What kind of furniture?

A. There were bedroom sets.

Q. What kind of bedroom sets?

A. Just ordinary bedroom sets.

Q. Oak or walnut or what?

A. They were pine, wooden bed room sets.
Q. Were there twelve carpets on the floors?
A. The carpets were full of holes.
Q. The carpets were full of holes?
A. Yes sir.
Q. What kind of chairs did you have in the dining room?
A. The uprights were pretty well racked when I bought them; they were second class chairs.
Q. Were there not a dozen and a half fine chairs?
A. They were pretty well racked; the cane bottoms giving away in most of them.
Q. Those leather chairs there, how about those?
A. There were no leather chairs there to my knowledge.
Q. So you put in those 12 bedrooms sets at $150 do you?
A. Yes sir.

862 Q. What do you refer to as "the other improvements $300"?

A. Such as wines and liquors, etc.—the other improvements.
Q. Yes.
A. Such as the little dwelling water closet and little barn; the chicken house attached to it and orchard and ground.

Mr. LAMAR: We object to any testimony here in regard to anything not on the right of way, as the bill of sale and his testimony show that that the bill was confined to the property on the right of way.

Objection overruled.

Q. Then you mean to say that there were only the twelve rooms furnished and that is what you put in at $150?
A. Yes sir.
Q. How about the little dwelling there that you were talking about what was in it?
A. I put the dwelling——
Q. What was a—what furniture was in the building?
A. There was a bedroom set, rocking chair, dresser, and commode.
Q. And you put no price on that at all, did you. What was that worth?
A. I put that in for the three hundred dollars.
Q. And you say that the building you put in at $1400?

863 A. Yes sir.

Q. Why was it the other day you put them in at $2200?
A. Because George Roberts said they cost him that, but they were alone at that time
Q. But were you not asked here the other day to set a fair valuation on these buildings?
A. No sir.
Q. Didn't we ask you on your oath the other day to put a fair valuation on those buildings and you put $2200, did you?

A. You figure it up and you will see that I did not exceed over $2400 on everything.

Q. On page 104 of the record you were asked the question, "did you know the value of all these buildings and improvements you have mentioned as belonging to George Roberts in 1897?" You answered "2500 all told."

A. That is what I stated right here.

Mr. HEITMAN: Buildings and improvements.

Q. Now you put in here the buildings at $1400, plus possibly $300, making $1700 and you are $800 short of the valuation you put on it the other day. Now were you giving us a fair statement of valuation at that time?

A. I gave you a fair statement of proceedings each and every time you have asked me a question.

Q. Were you putting a fair valuation on these buildings when you put them worth more than you now estimate them at. How about the piano; wasn't there a piano in there?

A. Yes sir.

864 Q. What value did you put on that?

A. Mr. White's family offered me $50 for that piano.

Q. Did you sell it to them?

A. I told them I would keep it before I would sell it for that.

Q. What was it worth?

A. Worth about $75.

Q. Why didn't you mention it as one of the pieces of property here?

A. Because you did not ask about it.

Q. Mr. Heitman asked you about everything else.

A. I put it in with the rest of them.

Q. What did you put it in at?

A. I put it in at Mr. White's price, $50.

Q. What item did you put in at $50?

A. Because that was the most I was ever offered for it after I bought it.

Q. Where did you put it in here, in reply to Mr. Heitman's question a little while ago?

A. With the furniture.

Q. Of that the $150 on the furniture related to the 12 bed room sets. Do you mean to say that is a part of the $150?

A. You did not ask me that.

Q. Then you placed the 12 bed room sets at $75 did you?

A. I placed them at $150.

Q. How about two extension tables, what were—are they worth?

865 A. They ain't worth anything.

Q. What were they worth then?

A. They might have been worth $10.

Q. A piece?

A. There was only one.

Q. There were not two extension tables?

A. No sir.

Q. Wasn't there a range there?

A. It has been used about two or three years may be four years before I bought it.

Q. What did it cost new?

A. I put it with the rest of the property.

Q. What was it worth?

A. It was figured– it was not figured worth anything when I go- it.

Q. It was not figured worth anything when you bought it. Didn't you say the other day that you paid $3000 for this property?

A. I did.

Q. Isn't it a fact that you did not pay but $1800 for it?

A. It was not my fault that I did not pay $3000; they had the papers to get it from me.

Q. As a matter of fact, you did not pay but $1800 for it?

A. It was not my fault that another man was hard up.

Q. No matter; you were stating here what you paid for that property; didn't you state you paid $3000 for it?

866 A. I paid $3000 for it.

Q. Didn't you testify awhile ago here that you did not pay but $1800 for it?

A. I did not say any such thing.

Q. You paid a thousand dollars when you got it didn't you?

A. Yes sir.

Q. Then you paid $800 in compromising it the whole business?

A. Yes sir.

Q. What else did you pay?

A. I paid $440 besides that.

Q. You paid $440 besides that on bills, but didn't you get in $400 collected on bills?

A. That is all right.

Q. That is so is it not?

A. That is my bargain.

Q. You stated here the other day that you paid $3000 for this property, and as a matter of fact you did not pay but $1800 for it. Is that not so?

A. My documents bound me to pay the full $3000. If a man was obliged to ask me for a favor which I granted to him and paid the balance, he was glad to get it.

Q. You think that is an excuse for you to come into court and tell that you paid $1200 more than you did, do you?

A. If you could get a horse for ten you would not pay thirty dollars would you?

Q. No, but if I did not pay but ten dollars for him I would

867 not come into court and say that I paid thirty.

Objected to as argument. Sustained.

Witness excused.

CARPENTER WILSON, recalled in rebuttal on behalf of contestant.

Direct examination.

By Mr. HEITMAN:

Q. Mr. Wilson state whether or not you know of your own knowledge that Ruben Johnson made any clearing or improvements on these six or seven lots where he built his big barn, in 1897?

Mr. LAMAR: I object, first because it is leading; second because it is incumbent upon the contestants to show the character of these improvements in their examination in chief and it is improper cross examination at this time.

Objection overruled. Exception taken.

A. Yes sir, I know there was clearing done there.

Q. What time, Mr. Wilson?

A. It was in the spring of 1897.

Q. Will you state what was the extent and character of the clearing on those lots when you saw it?

A. They had chopped the brush off and piled it and burned it and taken out a few stumps, I think. I could not be positive as to the stumps, but I know they were clearing that.

Q. You heard Mr. John E. White's testimony today in which he testified about notifying people generally and warning them against making any improvements on this land in controversy. Will you state whether or not he ever notified you or not to make your improvements?

Mr. LAMAR: I object, because this witness admitted while he was on the stand before that he knew that Mr. White claimed that he made these improvements at his own peril.

Objection sustained. Contestant excepts.

Cross-examination.

By Mr. LAMAR:

Q. Did not the railroad company cut some brush in there?

A. Yes sir; this side of there between there and the railroad track.

Q. Between there and the railroad track?

A. Yes sir.

Q. You say this clearing that you referred to was done in the spring of 1897?

A. Yes sir.

Q. How early in the spring?

A. I could not say; I think somewhere about—well it might have been late in June, but I don't think it; I think it was some time in May.

Q. Did you see the clearing done?

A. Yes sir; that is I saw the clearing after it was done.

Q. You saw the clearing after it was done?

A. Yes sir.

Q. Did you see anybody clearing it?
869 A. No sir; I can't say that I did.
Q. You did not see anybody clearing it?
A. No sir; I can't say that I did.
Q. You say the railroad men were clearing near the railroad?
A. The railroad people were cutting the brush, but they cut theirs up high and those people cut down close, grubbed out.
Q. Did not the railroad men cut the little brush low and big brush high?
A. They might, but this was all cut low, grubbed out.
Q. And you never saw anybody cutting it, but you knew it was cut?
A. No sir I knew it was cut.
Q. Is it not a fact that the railroad cut brush all through there both in 1896 and 1897?
A. I think they did.
Q. You think they did?
A. But I have reasons to——
Q. Might have been cut early as April, 1897?
A. No I don't think it was cut so early; it might have been but I did not see them cut it, so I could not tell you when it was cut.
Q. You don't remember the time exactly when you discovered it?
Mr. HEITMAN: You were going to say that you had reasons for believing something.
A. (Continued.) Reasons to know why this clearing was done and it was done and it was because I and Mr. Johnson bought
870 some lumber at the same time of Mr. Nagel—I guess Mr. Nagel will testify to the fact—in 1897 and we exchanged work in hauling lumber and he hauled mine down to my place and he hauled his as far as he could get to his place and piled it up.
Q. Who did?
A. Mr. Ruben Johnson.
Q. Now, Mr. Wilson, how is it you remember this was in 1897?
A. Because I know when I bought the lumber and hauled it down to my place.
Q. Do you know when you bought the lumber and hauled it down to your place?
A. Yes sir.
Q. Didn't Mr. Johnson when he was on the stand the other day say that he didn't construct his barn until 1898?
A. Yes sir.
Q. Did not Mr. Johnson when he was on the stand the other day testify that he did not build his fence until 1898?
A. I think he did. I did not say that we hauled it clear down there, I said we hauled it as far as we could on account of no road to it and piled it up.

JOHNSON recalled in rebuttal on behalf of contestant.

Direct examination.

By Mr. HEITMAN:

Q. Mr. Johnson did you hear Mr. Roberts testimony yes-
871 terday?

A. No, I did not; a little of it, very little.

Q. He testified as follows: "I can't say what month it was, but it was before Ruben Johnson ever moved over to Clarks Fork and he said he had a notion to come over and build and White says, if you come over and build I will claim your improvements, if you build on my ground." State whether or not you ever had such a conversation with White in the presence of Roberts or any conversation at all?

A. No sir I never did.

Q. Did you hear the evidence to day of Compton White and John E. White in which they testified that you had a row with John E. White in April or May, I believe it was, 1897?

A. I did not hear it, no.

Q. Prior to May, 1897, and that you and John E. White had not been on speaking terms since. You did not hear that.

A. No sir.

Q. Well such was the evidence?

A. I did not have no fuss then; we did not have no fuss until 1898, after the gray mare got killed. I had a mare who got killed on the railroad track and the same year a cow got killed, in July; then we were on speaking terms right along to 1898.

Q. You were not on speaking terms to that date?

A. About the time I got pay for the gray mare.

Mr. GRAHAM: Give us the date; we don't care for the gray
872 mare.

Q. What was the year?

A. 1898.

Q. Then you were on speaking terms with White up to 1898?

A. Yes sir.

Q. Were you present in Whitcomb's store at the time a conversation was had between Whitcomb and Eplin relative to an affidavit which Eplin had made in this proceeding?

A. I was.

Q. Did you hear the conversation?

A. I heard a little of it, not but a little of it.

Q. What did you hear Mr. Eplin say with reference to that affidavit?

A. I heard him say that he did not know the consequence of it that he did not read it.

Q. What?

A. He did not know what he was signing.

Q. That he did not read it?

A. Yes sir.

Q. You mean the contents?

A. The contents.

Cross-examination.

By Mr. LAMAR:

Q. Mr. Johnson, did you say that you did not hear Mr. White's testimony this afternoon?

A. Not much of it, no.

Q. As a matter of fact did you not have occasion to drive your cows down on that part of White's land west of the county
873 road and either White or his son drove the cattle off of there on to the railroad track and you threatened to prosecute them for doing it?

A. That was in 1898.

Q. That was in 1898?

A. Yes sir.

Q. But such a thing occurred did it; you have some unpleasant feelings with them about that cow?

A. I did not drive them down; he drove them back and the neighbors told me they seen the cows there; he drove them back.

Q. He drove them on the railroad track?

A. He drove them on the railroad track.

Q. You threatened to prosecute him for doing it?

A. I told him something like that and I told the claim agent he was the means of getting the cow killed and he gave me five dollars on account of that; that is right too.

Q. Where was it this conversation took place between Whitcomb and Eplin and where was Whitcomb and where was Eplin?

A. Whitcomb was sitting at the desk in the store and Eplin came there and I was sitting near the stove.

Q. Were you sitting near the stove?

A. Yes sir.

Q. And Eplin was down there by the desk where Mr. Whitcomb was, was he.

A. Yes sir.

Q. How far was it from the desk to the stove?

A. About ten or twelve feet.

874 Q. Ten or twelve feet?

A. Yes sir.

Q. And Mr. Whitcomb is in error when he says it was twenty feet is he?

A. I don't know how far it is; it may be a little farther.

Q. What conversation did you hear?

A. I have just stated that he didn't know what he had signed; Mr. White asked him to sign a paper and he signed it.

Q. Who spoke to Eplin; how came Eplin to talk about the paper?

A. Whitcomb asked him.

Q. Whitcomb asked him did he?

A. Yes sir; the contract.

Q. And Eplin said he did not know the consequence of that paper?

A. Yes sir.

Mr. HEITMAN: Contest?

Mr. LAMAR: He said "consequence." The witness: You know what I mean.

Witness excused.

Mr. HEITMAN: I offer in evidence photograph of the store building in controversy, in rebuttal of contestee's efforts to show it merely as a shack.

Mr. GRAHAM: We object as immaterial and irrelevant and the date when this photograph was taken is not set forth and it is not proper rebuttal.

The photograph is marked Contestant's exhibit "C" on Supplemental hearing.

875 Contestant closes.

Contestee's surrebuttal.

R. R. MARSTON, called in surrebuttal on behalf of contestee.

Direct examination.

By Mr. GRAHAM:

Q. State your name, occupation and residence?

A. R. K. Marston, my business is building and general contracting. I reside here in town.

Q. I will ask you to examine this photograph marked Contestant's exhibit "C" on supplemental hearing, showing the store building of Whitcomb Bros. & Nagel, located on the land in controversy and will say to you that the dimensions of that building are 24 x 50, two stories with a 16 x 24 warehouse, with a shed roof on the back and a woodshed and oil house 12 x 16 on the west side, with a cement finished cellar 16 x 24 , eight or nine feet deep with counter and shelving inside?

A. Is the cellar in the main part of the building?

Q. Under the rear part.

A. Under the rear part—under the warehouse.

Q. Yes sir. It is estimated by Mr. Whitcomb that there are 36,800 feet of lumber in this building, about one-half rough and dimension lumber and the other dressed or finished lumber. I will ask you, assuming that the 36,800 feet is correct, what would be the cost of the construction of this building, including the cellar,

876 in 1895 to 1897, with carpenters' wages at $3 per day at Clarks Fork, in Kootenai county?

A. In taking this 36,800 feet into consideration you mean the price that we figured at, allowing twelve to fifteen per cent. profit for the contractor to run it or what it would actually cost?

Q. No the actual cost of putting it in there?

A. Well, I should say that that carpenter work was worth $368. That is, I mean, by that on that amount of lumber.

Q. On that amount of lumber.

A. I don't mean making any doors or making any sash or putting on any mouldings or necessaries inside; putting whatever mouldings there are on this cornice—I see there are some—and putting these

brackets in front and work of that sort, such as we men designate as mill work, I am going on the supposition that mill work would be furnished; to put the 36,000 feet of lumber as it came from the yard, say one-half surfaced and one-half rough, I would say it was worth about $368.

Q. Would you make a rough estimate as to what would be the cost of erecting that building at Clarks Fork between 1895 and 1897 giving the price of rough lumber at $6 per thousand and the dressed lumber at $7.50 per thousand.

A. You mean on the superstructure or taking into consideration the basement, the cellar?

Q. The cellar and all.

877 A. How deep did you say they estimated that cellar?

Q. About eight feet.

A. Is there a cement floor?

Mr. GRAHAM: It is a cement floor, Mr. Whitcomb?

Mr. M. P. WHITCOMB: A cement floor, yes sir.

A. The size of the cellar is what?

Q. 16 x 24.

A. Does the stone wall extend all around this building or just around the cellar?

Mr. M. P. WHITCOMB: Just around the cellar.

The WITNESS: What is the foundation under the rest of the house?

Mr. M. P. WHITCOMB: Timber, posts, sills.

The WITNESS: What was stone mason's wages at about that time this was built?

Mr. M. P. WHITCOMB: I don't know; we did it principally ourselves.

(By Mr. GRAHAM, resuming:)

Q. Estimate stone mason's wages a- $5 per day.

The WITNESS: The floor in the cellar is cemented?

Q. Yes sir.

Mr. M. P. WHITCOMB: Has a heavy ballast floor on account of the water coming up underneath there and we made the floor weighty enough to try to hold it.

A. That cellar wall and the cementing of the floor is worth about $200.

Q. About $200?

A. Yes sir. We pay $5.50 per day for stonemasons here

878 (Cœur d'Alene), and we charge $2.25 a perch that is 16½ cubic feet in a perch; that is the way they figure it.

By Mr. HEITMAN:

Q. Cellar without cement?

A. Cellar without cement is worth about $200 outside of excavation; I don't know how much excavation was done; the excavation is probably worth about 25 to 30 cents a yard.

By Mr. GRAHAM, resuming:

Q. Now would you give us an estimate on the remaining portion of that building?

Mr. M. P. WHITCOMB:

A. The excavation ought to be done entirely from the top surface down. Is that the rock?

A. That is the rock. The wall of this building right across here cost $2 a perch and I have just finished a couple of walls up here——

Q. Would the rock be delivered on the ground or at the quarry?

A. For the rock in place.

Q. Bringing it from the quarry and laying it?

A. Yes sir.

Mr. M. P. WHITCOMB: I have sought in my estimate to include the getting of the rock, which was very expensive, to our place on account of constructing roads to the quarry.

The WITNESS: I base the cost of this rock work at the same it would cost us here; it costs us about 70 or 80 cents here.

Mr. HEITMAN: This was seven or eight years ago.

879 By Mr. GRAHAM (resuming:)

Q. Will you give us the estimate on the other portions of the building?

A. The building there completed?

Q. Yes sir.

A. The whole thing?

Q. Yes sir.

A. In my judgment that building is worth about, to build on that basis, that building is worth I should say $1600.

Q. Including the cellar?

A. Yes sir, between $1600 and $1700.

By Mr. HEITMAN:

Q. Would that cover the painting doors?

A. Yes sir, I think so. Is there anything outside of two coats of paint there?

Mr. M. P. WHITCOMB: Two coats of paint.

The WITNESS: It costs me about 12 cents a yard.

Q. $16 to $17?

A. Yes sir.

By Mr. GRAHAM, resuming:

Q. How long have you been engaged in the carpentering and contracting business?

A. Going on 20 years; between 19 and 20 years.

Q. You are familiar with the probable cost of such a building as that, are you?

A. Yes, I built buildings very similar to that.

Q. From the description given you?

A. Yes sir.

By Mr. M. P. WHITCOMB:

Q. Did that include the shelving and fixtures?

880 A. No, I would not say that. I don't know how extensive shelving and fixtures you might put in there.

Q. The shelving and fixtures are counters, that open on both sides; shelving clear around except on the back end, on both sides.

A. I put shelving in the store last fall——

Q. (Interrupting.) The counters are strips put up edgeways and bolted through and glued panel work, all panel work.

A. Well, you put up shelving and counters and things of that sort in a building of that size, it would run all the way from $250 to as high as a man might go. I have just placed some fixtures down here which cost a thousand dollars, that don't occupy a third of the space that is occupied here (referring to photograph).

Q. Our counters are as good as they could make them.

A. Plain shelving, and lumber at $6 a thousand, the carpenter work at 30 cents an hour, you can shelve that pretty plentifully for a couple of hundred dollars, and counters too.

Q. There are show cases through it.

A. I don't know anything about that.

Excused.

Stipulation.—It is stipulated and agreed by and between the respective counsel for contestant and contestee, that contestant may have until the 17th day of April, 1902, in which to prepare
881 and serve his brief herein, and that contestee may have until the 10th day of May in which to prepare and serve his brief in. Copies of said briefs are to be furnished to opposite counsel, the acting register, Hon. Lewis E. Sharp, of Spokane, Wash., and one copy to the Receiver of the Coeur d'Alene Land Office. The signing of this stipulation is hereby waived, contestee with his counsel, and contestant with his counsel, being present at the time of the entering into by said parties of the said stipulation.

Case closes.

DEFENDANT'S EXHIBIT No. 7.

Possessory Right.

John E. White, of Kootenai County, Idaho Territory, being a citizen of the United States and over twenty-one years of age have on the 17th day of November, 1890, settled upon and improved the following described tract of unsurveyed government land in said county and territory, to-wit:

Commencing at a point on the south side of the N. P. Ry. track about 20 yards east of the N. P. Ry. depot, at Clarks Fork river, thence east along the bank on Clarks Fork river 160 rods east from said southwest corner, thence due north from said river to a point due east from the place of beginning and thence due east from the place of beginning and thence west 160 rods, to the place of beginning, said tract of land being joined on the west by John McQuide's ranch the place of beginning, and containing not more than
882 one hundred and sixty acres, for the purpose of cultivation and grazing, and place of residence, that said tract or claim contains not more than one hundred and sixty acres of land and is

DARK PAGE BLEE

in a compact form and no place less than eighty rods in width, and so distinctly marked that the boundaries thereof may be easily traced.

I make this location under the laws of the Territory of Idaho, pursuant to an act entitled "An act prescribing the mode of maintaining and defending Possessory Action on the public lands in the state of Idaho, approved December 10, 1864."

JOHN E. WHITE.

Signed in the presence of
ROBERT H. WHITE.
M. P. STEPHENS.

STATE OF IDAHO,
County of Kootenai, ss:

I, Jno. C. Callahan, County Recorder, in and for the County and State aforesaid, do hereby certify the within and foregoing to be a full, true and correct copy of the whole thereof of Possessory Right of Jno. E. White, as the same appears of record in my office in Book A of Poss. Claims at page 139.

In testimony whereof I have hereunto set my hand and affixed my official seal this 25th day of March, 1902.

JNO. C. CALLAHAN,
County Recorder, Kootenai Co., Idaho,
[SEAL.] By PEARLE L. MERTON, *Deputy.*

Endorsed.

SS STATE OF IDAHO,
County of Kootenai, ss:

Filed for record at the request of Thos. Fitzsimmons, on the 18th day of Nov. 1890, at 10:5 o'clock a. m., and recorded in Book A of Poss. Claims on page 139, Records of Kootenai County, State of Idaho.

ROBT. S. BRAGAW,
County Recorder.

LEEDTHRU

DEFENDANT'S EXHIBIT No. 9.

(Being the first part of the document offered in evidence by plaintiffs, marked Plaintiff's Exhibit "C," being a certified copy of certain documents and records of the General Land Office, the certificate of true copy appearing attached to the part offerd as Exhibit "C" at page — of this transcript, is not set out again here.)

(G) (Copy) W. H. L.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *July* 11, 1900.

HENRY MELDER, for Clarks Fork Townsite,
vs.
JOHN E. WHITE.

N. W. ¼ of S. W. ¼ Sec. 2, T. 55 N., R. 2 E., B. M.

Register and Receiver, Cœur d'Alene, Idaho.

SIRS: I enclose herewith a copy of the decision of the
884 Honorable Secretary of the Interior, dated September 2, 1899, in the case of Henry Melder, for Clarks Fork townsite, *vs.* John E. White, in which plaintiff's petition for re-review of departmental decision of May 22, 1899 (28 L. D. 412) is denied, as also an application for rehearing therein contained.

Said case is accordingly closed, and you will so notify the parties.

It will be observed that the enclosed decision closes with the following words:

The motion (for rehearing) and affidavits on which it is based have no proper place in the present record, since they state a new cause of complaint separate and distinct from the one on which the hearing was made before the local office, and upon which the record was made up. The Department has repeatedly held that new causes of complaint can not be engrafted upon cases pending before the Department on appeal. But in such cases your office is not precluded from directing an inquiry in the nature of a new contest, see Lark *vs.* Livingston, 26 L. D., 163, and cases therein cited.

For these reasons the application for rehearing is denied.

The affidavits referred to are four in number, being those of M. P. Whitcomb, R. Johnston, Jason Edwards and Mrs. Jason Edwards.

Mr. and Mrs. Edwards in the pertinent portion of their
885 affidavits allege that in the fall of 1895, when contemplating building a dwelling, the former was approached by White and told that if he would select lots on the north side of the railroad track and improve them White would give him title thereto, upon proving up, as he (White) intended making a townsite of the land, and that he (Edwards) accordingly built his dwelling as indicated.

In respect to these two affidavits, it may be said that the original

hearing in this case was had in February, 1896, and one of the grounds of the contest against White's entry was that he did not make entry in good faith but solely for speculative purposes. A sale or agreement to sell at the time alleged of a part of the land embraced in his homestead entry would have been evidence of bad faith or of speculative intent. Any such evidence as could have been introduced at the trial in February, 1896, therefore, should have been then introduced, and it is now too late for its presentation; and for this reason, the affidavits of Edwards and wife, alleging facts occurring in 1895, cannot now be considered.

In the affidavits of Whitcomb, the affiant (in behalf of the probate judge) swears that he is informed and believes that White is now holding, and ever since his entry has been holding the N. W. ¼ S. W. ¼ Sec. 2, T. 55 N. R. 2 E., for speculative purposes and not for *bona fide* homestead purposes in this, to-wit, that he is holding the same to be used by himself for townsite purposes as soon as
886 he can obtain title thereto under his homestead entry, and, as corroborative thereof in the affidavit of Johnson the affiant swears that in May, 1897, he contemplated building a house on the south side of the railroad track on the land in dispute, believing it to be a part of the townsite, when White approached him and advised against it, saying he intended to use that side of the track for pasturage, but if he (Johnson) desired, he could take lots on the south side, and, if he (White) was able to prove up, he would give him a good title to such lots, as he intended to make a townsite of the land and sell off the lots, and that relying upon this statement, he (Johnson) cleared and fenced seven lots on the north side of the railroad and built a small house and a barn at a cost of $325.

The entry of White, H. E. 958, for N. ½ S. W. ¼ and lots 5 and 6, Sec. 2, T. 55 N., R. 2 E., was made on November 27, 1895, immediately after the filing of the townsite plat in your office. Final proof on same was submitted November 29, 1897, showing settlement to have been made in 1891, and residence to have been established on February 26, 1892; and final certificate (No. 417) was issued to White on July 15, 1899. From this it appears that the facts alleged by Johnson occurred two or three months after the expiration of the five years period, dating from the time of settlement, but some six months before the submission of proof by White:
887 The homestead law, by section 2290 of the Revised Statutes, provides that the applicant upon making entry of land shall swear:

That he or she does not apply to enter the same for the purpose of speculation, but in good faith to obtain a home for himself *for* herself, and that he or she — not directly or indirectly made and will not make, any agreement or contract, in any way or manner with any person or persons, corporation or syndicate whatsoever, by which the title which he or she might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person except himself or herself.

And, by section 2291, declares that—

No certificate, however, shall be given, or patent issued therefor,

until the expiration of five years from the date of such entry; and if at the expiration of such time, or at any time within two years thereafter the person making such entry . . . proves . . . that he . . . (has) resided upon or cultivated the same for the term of five years, immediately succeeding the time of filing the affidavit and making affidavit that no part of such land has been alienated, . . . then in such case, . . . shall be entitled to a patent, as in other cases provided by law.

Admitting, as has been argued that during the interval described, between the time of the expiration of the five years from the date of White's settlement and the time of the submission of his
888 proof, White has not gained such a vested right in the land embraced in his entry as to be enabled to alienate such land, I find that White's good faith in making the entry has been established in the enclosed decision, and the former departmental decision of May 22, 1899 (L. D. 412), so that it will not now be questioned, Sec. 23 L. D., 188; office decision of March 3, 1899, in Scott *vs.* Nevada; and departmental decision of June 29, 1899, in St. Clair *vs.* Edick. And it only remains to be examined, therefore, whether the allegation found in the present affidavits if proved, would be sufficient to invalidate White's entry as violative of the law above quoted that, in effect, he shall not make any agreement or contract whereby the title he may acquire will inure to others, and shall not alienate the land or any part thereof.

The allegation to be subjected to this tract is that embodied in Johnson's affidavit, *supra*, and is that in May, 1897, White told him if he would take lots on the north side of the railroad instead of on the south side he (White) would give him a good title to such lots, and that, relying on this statement, he cleared and fenced and built a house upon seven lots on the said north side.

An affidavit filed as the basis of a contest against an entry does not justify the ordering of the hearing thereon unless it sets forth clearly charges that if proved, will warrant the cancellation of the entry. 7 L. D., 452; L. D. a25; 17 L. D. 125, 177.

889 The affidavit of Johnson does not allege an alienation by White. Does it, then, set forth clearly an agreement or contract by White—

by which the title which he might acquire . . . should inure in whole or in part, to the benefit of any person, except himself.

Since the entryman was at liberty to alienate the land after the submission of proof (10 L. D., 142; 17 L. D., 366; 22 L. D. 328) it is necessary that the affidavit allege that such agreement or contract was made prior to November 29, 1897. This the affidavit does not do in express terms, nor is it necessary intendment to that effect. It only makes definite the time of the offer of White, namely, May, 1897, and does not state when the subsequent acceptance (the house building, etc.) occurred. Such acceptance might have been after the following November, and until such acceptance there could be no agreement or contract.

Again, it may be said that probably it should be held that no con-

tract was made in the case; for it is doubtful if there was present one of the requisites of a contract, namely a consideration for White's promise and only a verbal contract is alleged to have been made, while by the law of Idaho (Sec. 6009 Revised Statutes of 1887) an agreement for the sale of real property, or an interest therein is valid, unless such agreement or some note or memorandum thereof be in writing. To eliminate the necessity for writing, the
890 equitable doctrine of part performance would have to be invoked, and this part performance (house building etc.,) may as above seen, have been subsequent to the submission of proof, making the contract entirely immaterial to the homesteader's rights; and even then a definite and certain contract based upon a valuable consideration would have to be shown before a court would decree its specific performance. See in this connection Dawson *vs.* Higgins, L. D., 544.

Another affidavit, more pertinent than others filed with it, was filed here by counsel for the townsite in October, 1899. The affiant, J. S. Forman, there swears that in the spring of 1897, White approached him and told him that if he (Forman) would sign a certain affidavit, he (White) would win the townsite and would deed to him the lots his (Forman's) hotel stood upon. Forman does not allege that he signed the affidavit, and his allegations are open to the objections above stated in reference to Johnson's affidavit.

Accordingly, the application for rehearing must be, and is hereby, denied.

Duly notify the parties hereof, and of the right of appeal.

Very respectfully,

BINGER HERMANN,
Commissioner.

891 "G" Doc. T. S. 2, case 53. T. W. A. J. W. W.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *March* 28, 1901.

CLARKS FORK TOWNSITE
vs.
JOHN E. WHITE.

Contest H. E. No. 958 and F. C. 417.

Register and Receiver, Cœur d'Alene, Idaho.

SIRS: November 27, 1895, John E. White made a homestead entry, No. 958, for N. ½ S. W. ¼ and lots 5 and 6, Sec. 2, T. 55 N., R. 2 E. B. P. M.

January 8, 1896, a contest for the cancellation of White's entry, as to the N. W. ¼ S. W. ¼ of said section was instituted by Henry Melder, probate judge, on behalf of the occupants of Clarks Fork, a town located on said land, in which contest it was alleged that said

S. W. ¼ of S. W. ¼ had been occupied for business and trade ever since 1884, and—

that, as this affiant is informed and believes, the said John E. White's homestead entry upon said forty acre tract of land, is not made in good faith, as required by the homestead laws, but solely for the purpose of speculation.

892 A hearing was had the taking of testimony closing on February 29, 1896, and the local office decided that the townsite settlers were entitled to enter the land occupied by them, being about two acres, and that White was entitled to the remainder.

February 6, 1897, by letter "G," this office, on appeal, held White's entry for cancellation as to said N. W. ¼ S. W. ¼ and May 12, 1897, on a motion for review said decision was sustained.

August 3, 1898, the department on appeal affirmed the decision of this office.

May 22, 1899, on a motion for review, the Department held (28 L. D. 412) that at the time White made his homestead settlement the townsite was all on the railroad right of way granted by act of Congress by which grant the railroad company "took the fee and not a mere easement" to said right of way. The departmental decision under review and the decision of this office of February 6, 1897 were therefore reversed and White's right to the land was held to be superior to that of the townsite claimants, the contest was dismissed and White entry was held intact.

July 15, 1899, on receipt of several letters from townsite occupants informally asking for a review of said decision of May 22, 1899, the Department denied such application.

July 18, 1899, a petition for re-viewing was filed, alleging
893 errors of law and fact, and therewith several affidavits were filed, among which was one by John S. Forman, in which, on June, 1899 he swore that he was engaged in the hotel business in said town, that said hotel occupied two lots therein and he had two adjoining lots cultivated as a garden; that he valued the buildings and other improvements on said lots at $2000; and—

that on account of the favorable decision, both by Hon. Commissioner of the General Land Office and the Hon. Secretary of the Interior, in favor of the townsite, he felt safe and justified to make valuable improvements on his property during the past 2 years.

August 30, 1899, a motion for further hearing was filed, based on the affidavits of Moses Whitcomb, Reuben Johnson, Jason Edwards, and Mrs. Jason Edwards, filed therewith.

September 2, 1899, the Department denied the petition for reviewing and in passing upon said motion, held as follows:

The motion and affidavits on which it is based have no proper place in the present record, since they state a new cause of complaint separate and distinct from the one on which the hearing was had before the local office, and upon which the record was made up. The Department has repeatedly held that new causes of complaint cannot be engrafted upon cases pending before the Department on

appeal, but in such cases your office is not precluded from
894 directing an inquiry in the nature of the new contest. See Lark *vs.* Livingston, 26, L. D., 163, and case cited.

For these reasons, the application for re-hearing is denied.

Whitcomb in his affidavit charges on information and belief that White is and ever since his entry has been holding said N. W. ¼ S. W. ¼.

for speculative purposes and not for *bona fide homestead* purposes, in this, towit: that the said John E. White is holding the same to be used by himself for townsite purposes as soon as he can obtain title thereto under the homestead entry, and in corroboration hereof affiant submit the attached affidavits and ask that a hearing upon the above charges be ordered.

Jason Edwards' affidavit was to the effect that in the fall of 1895, White promised him that if he would not build on the railroad right of way he might select lots on the north side thereof on which to build, and in case he, White, was successful in securing title to the land, he would deed the lots Edwards should so improve to him as he, White, "intended to make a townsite of it and sell off lots," and that relying thereon affiant built on two such lots. Mrs. Edwards corroborated her husband's affidavits and further swore that in the winter of 1894 and 1895, White told her he had moneyed
men to come in and make a town of the place and would
895 change its name to Whiteville, and boasted that Whitcomb's store would pay his lawyers.

Reuben Johnson in his affidavit swore

That he has claimed and fenced seven lots, and erected a small house and barn at Clarks Fork, Idaho, on the north side of the track, which cost him $325; that on or about May first, 1897, contemplated building a dwelling house in Clarks Fork on the south side of the railroad and picked out the lots in good faith, believing them to be a part of the townsite, when he was approached by John E. White, who advised him not to build on that side of the railroad.

He stated that he intended to use that side of the track for pasture, but if he, the said Johnson, would select lots on the other side of the railroad track and improve them, he, the said White, would, in the event of his being able to prove up his homestead claim give him a good title to the lots, as he intended to make a townsite of it and sell off the lots; and relying upon this promise, he, the said Johnson, did clear the seven lots, fence them, and erect his buildings thereon, and the said White knew that he was so improving the property relying upon the agreement made between them as to the seven lots, and that the said White did not claim that he intended to use the land on the north side of the railroad track for a homestead, but frequently stated that he intended to speculate with it by selling off the lots for a town.

October 7, 1899, affidavits were filed on behalf of the town-
896 site settlers, as follows: One in which Jason Edwards swears that in August 1985, his brother-in-law George Roberts, showed him a contract Roberts had with White whereby White was to deed to Roberts all the lots he would need for his buildings in

Clarks Fork, White therein binding himself not to sell to any other parties any town lots to build any saloon or hotel upon anywhere near the depot, in consideration of which Roberts was to do all in his power to help White win the land.

J. S. Forman swore that in the spring of 1896, George Roberts wanted to sell his store, saloon, and hotel, and in the presence of R. Johnson told him he would turn over to him a contract he had with White, which Forman described in his affidavit as containing the same provisions mentioned in the preceeding affidavit, Reuben Johnson corroborated Forman's affidavit. Another affidavit was made by Forman, in which he swore that in the spring of 1897, White told him that if he would sign a certain affidavit that White would "win the townsite sure," and would then deed him the lots on which his hotel stood.

Some other affidavits were filed relating to the matter in controversy at the hearing had in 1896, and to the character of White's witnesses and their evidence.

July 11, 1900, by letter "G" this office in passing upon the affidavits returned to it with said departmental decision held in
897 reference to Mr. and Mrs. Edwards' affidavits as follows:

In respect to these two affidavits, it may be said that the original hearing in this case was had in February, 1896, and one on the grounds of the contest against White's entry was that he did not make entry in good faith but solely for speculative purposes. A sale of agreement to sell at the time alleged of a part of the land embraced in the homestead entry would have been evidence of bad faith or of a speculative intent.

Any such evidence as could have been introduced at the trial in February, 1896, therefore, should have been then introduced, and it is now too late for presentation; and, for this reason, the affidavits of Edwards and wife, alleging facts occurring in 1895, cannot now be considered.

In reference to the affidavits of Whitcomb and Johnson and to Forman's affidavit filed in October, 1899, said decision of this office held as follows:

The entry of White, H. E. 958, for N. ½ S. W. ¼ and lots 5 and 6 Sec. 2 T. 55 N. R. 2 E. was made on November 27, 1895, immidiately after filing the townsite plat in your office. Final proof on same was submitted November 29, 1897, showing settlement to have been made in 1891 and residence to have been established on February 26, 1892, and final certificates (No. 417) was issued to
898 White on July 15, 1899. From this it appears that the facts alleged by Johnson occurred two or three months after the expiration of the five years period dating from the time of settlement, but some six months before the submission of proof by White. . . .

Admitting, as has been argued that during the interval described, between the time of the expiration of the five years from the date of White's settlement and the time of the submission of his proof, White had not gained such a vested right in the land embraced in his entry as to be enabled to alienate such land, I find that White's good faith in making the entry has been established in the enclosed

decision, and the former departmental decision of May 22, 1899 (28 L. D., 412,) so that it will not now be questioned. See 23 L. D., 818; office decision of March 3, 1899, in Scott *vs.* Nevada; and departmental decision of June 29, 1899, in St. Clair *vs.* Edick. And it only remains to be examined, therefore, whether the allegations found in the present affidavits, if proved would be sufficient to invalidate White's entry as violative of the law above quoted that, in effect, he shall not make any agreement or contract whereby the title he may acquire will inure to others, and shall not alienate the land or any part thereof. . . .

Since the entryman was at liberty to alienate his land after the submission of proof (10 L. D. N. P. 124; 17 N. P. L. D., 366; 22 L. D. N. P. 328), it is necessary that the affidavit allege that such agreement or contract was made prior to November 29, 1897.

899 This the affidavit does not do in express terms, nor it is necessary intendment to that effect. It only makes definite the time of the offer of White, namely, 1897, and does not state when the subsequent acceptance (the house building, &c. -) occurred. Such acceptance might have been after the following November, and until such acceptance there could be no agreement or contract.

Again it may be said that probably it should be held that no contract was made in this case, for it is doubtful if there was present one of the requisites of a contract, namely, a consideration for White's promise, and only a verbal contract is alleged to have been made, while by the law of Idaho (Sec. 6009 Revised Statutes of 1887), an agreement for sale of real property, or of any interest therein, is invalid unless such agreement or some note or memorandum thereof be in writing. To eliminate the necessity for writing, the equitable doctrine of part performance would have to be invoked, and this part of performance (house building &c) may, as above seen, have been subsequent to the submission of proof, making the contract entirely immaterial to the homesteader's rights; and even then a definite and certain contract based upon a valuable consideration would have to be shown before a court would decree its specific performance. See in this connection Dawson *vs.* Higgins, 22 L. D. 544.

Another affidavit, more pertinent than others filed with it, was filed herein by counsel for the townsite in October, 1899. The

900 affiant, J. S. Forman, there swears that, in the spring of 1897, White approached him and told him if he (Forman) would sign a certain affidavit, he (White) would win the townsite and would deed to him the lots his (Forman's) hotel stood upon. Forman does not allege that he did sign the affidavit, and his allegations are open to the objections above stated in reference to Johnson's affidavit.

Accordingly, the application for rehearing must be, and hereby denied.

August 11, a motion for review of said decision of July 11, 1900, was filed on behalf of the townsite, charging that said decision was erroneous in holding that the facts set forth in Mr. and Mrs. Edwards' affidavits have been adjudicated; that the affidavit of Whitcomb and Johnson were not a sufficient basis for an order of

hearing; and—"that probably it should be held that no contract was made in this case."

With this motion the affidavits of Reuben Johnson and J. S. Forman were filed. Johnson swears that the statement made in his former affidavit were true: and relying upon White's representations and promises, affiant, in the month of May, 1897, accepted White's proposition and in that month built the house mentioned in his former affidavit; and that later in the same season and prior to November 2, 1897, affiant cleared, fenced, and built a barn on
901 other lots, amounting altogether to seven lots, his improvements being of the value of $350. That he did all these things on the express proportion and agreement of John E. White.

Johnson further therein swore that at the time he made his former affidavit it did not occur to him that it was important to mention the date of making his improvements. His affidavit as to said date was corroborated by the affidavit of M. P. Whitcomb and J. S. Forman.

J. S. Forman in his affidavit swore that White on September 25, 1895, proposed to him that if he would buy the "Butler Bros. hotel and saloon" and repair them and run a hotel, that he, White would pledge himself to sell him the town lots his buildings would occupy for not more than ten dollars apiece that in May 1896, White renewed his former proposition and stated that he had made his filings and would make his promises good——

that he accepted White's proposition and did buy the Butler buildings in December, 1896, and did repair the buildings and improved them to the amoun- of $1500; and that he did all this wholly upon the promises White made him as to selling him the town lots.

September 11, 1900 a motion to dismiss the motion for review was filed on behalf of White on the stated grounds that "priority of settlement, good faith, and alleged speculative intent of the
902 entryman" had been repeatedly decided in his favor that the entryman had made final proof on his entry and final certificate had issued to him thereon and the person whose affidavits are filed can only be considered as more protestants that the law does not accord to the townsite occupants, as a matter of right, the privilege of hearing upon any of the grounds now alleged; and that the affidavits are not filed in good faith as is shown by the record and the counter affidavits filed with said motion to dismiss.

Among the counter affidavits filed with said motion were three made by White, in the first of which he denies the charges contained in Reuben Johnson's affidavit and declares the same to be false, and further says that Johnson never built a residence on the land but came in possession of a small house thereon in February 4, 1899; that he made no improvements on the -and in 1897, but the barn referred to by him was built in the fall of 1898, more than twelve months after the time he falsely claims it was built. This affidavit was corroborated by Robert H. White, Alfred R. Derr, Julius B. Williams, Compton I. White, A. Jacobson, and Joe Rusitshka as to the allegations that Johnson never built a residence on the land and as to the date he came in possession of said small house and

built said barn White in his other two affidavits denied all of the material allegations of Forman's and Mr. and Mrs. Edwards' affidavits, made any contract, obligation, or promise with Rob-
903 erts or any other person concerning his entry or any portion thereof.

An affidavit by Roberts was also filed in which he swore that White and Johnson were frequently in the store at various times from 1894 to the spring of 1896, at which time he heard White tell Johnson "that if he built on his land, he White, would hold his improvements if he was finally successful with his case;" that he heard Johnson say to White, probably in the fall of 1896——

I have a brother who is employed in one of the government offices in Washington, and I wrote to him to know about the townsite business, and he said if I wanted to build on any of the lots to go ahead and do so, and I will hold them, and you have no right to keep me off.

Another affidavit made by Robert E. McFarland, attorney for White, was filed, in which he alleges that during the month of August, 1899, at the Butler building used by J. S. Forman as a hotel, he heard Forman tell White that, he, White, had never made any promises concerning said hotel property to him Forman, but he thought when he bought the property that it would be all right if the townsite won, and if White won he "would not be hard on me and would sell my lots to me reasonably."

December 15, 1900, a brief with numerous other affidavits was filed on behalf of White. One of said affidavits was made by Roberts in which he denied ever having any contract or promise with White, "either verbal or written," in reference to any part of the
904 land in controversy and that Edwards, Johnson and Froman's statements in their affidavits in reference thereto, were false. Among said affidavits are some made by White in which he says that he warned many of the said settlers including Edwards and Forman, not to build on the land, and if they did he should hold their improvements in case he was successful in his contest.

December 19, 1900, a motion was filed to strike out the brief and affidavits filed on White's behalf, on the grounds that contestant was entitled to the closing argument, and that "a case cannot be tried by affidavits."

1. Under the pleading and evidence at the hearing in February, 1896, and the final decision thereon, the right and interests, of all parties in said N. W. ¼ S. W. ¼ up to the time of said hearing have been finally adjudicated. Said decision has placed the townsite settlers in the status of claimants for said land subject to the superior rights of White as shown at said hearing.

2. The claimed contract by White with Edwards to convey a part of said land, and White's statements as shown by Mr. and Mrs. Edwards' affidavit appear to have been made prior to said hearing, and evidence thereof could have been introduced thereat and the holding in the decision complained of, that "it is now too late for its presentation," was not error.

3. A hearing has been had upon charges involving the
905 good faith of the entryman, the final decision of the Department is in his favor, and he has made final proof. The charge that the entryman was speculating in the land for townsite purposes was one of the issues in the former hearing, and the fullest opportunity has been offered to both sides to submit all evidence upon that question. It is now a matter of discretion with the office to order another hearing upon the affidavits of Reuben Johnson and J. S. Forman, or to refuse the application therefor. The allegations in Forman's affidavit of June 22, 1899, directly negative the charges in his subsequent affidavits. Considering the length of time this matter has been pending and all of the foregoing facts and the uncertainty that a hearing would change the result, I deem it best that this controversy should not be closed and see no reason for reversing my former decision.

The motion for review and the application for a hearing are therefore hereby denied.

Notify the parties hereof and the contestants of their right of appeal.

Very respectfully,

BINGER HOFMANN,
Commissioner.

906 "G" Doc. 2, Case 52.

D. W. I. R. C.

DEPARTMENT OF THE INTERIOR. T. W. A.
GENERAL LAND OFFICE. J. W. W.
WASHINGTON, D. C., *January* 14, 1902.

HENRY MELDER, Trustee for Clarks Fork Townsite,
vs.
JOHN E. WHITE.

Contest H. E. No. 958 and F. C. 471.

Register and Receiver, Cœur d'Alene, Idaho.

SIR: I enclose herewith a copy of departmental decision of December 20, 1901, directing that a further hearing be forthwith ordered, with as little delay as may be consistent with the due protection of the rights of all concerned, in the case Henry Melder as trustee for Clarks's Fork Townsite, involving Melder's H. E., No. 958, made November 27, 1895, for N. ½ S. W. ¼ and lots 5 and 6, Sec. 2, T. 55 N., R. 2 E., B. P. M., upon which final proof has been made by White, and final certificate, No. 417, has been issued to him.

Said departmental decision limits the hearing ordered to certain questions therein specifically mentioned, and directs that you, from the evidence submitted thereat and the evidence submitted at
907 the former hearing heretofore had, make such findings of facts and recommendation in the premises as you may believe

to be right and according to law; and that you will afford the usual opportunity to appeal therefrom.

You will therefore immediately notify all parties in interest of said departmental decision, and fix as early a day for the hearing ordered as may be consistent with the protection of the right and interest of all concerned, and duly notify them thereof, and proceed strictly in accordance with the requirement of said departmental decision.

I herewith also transmit the evidence submitted at said former hearing, and all affidavits and other papers in the case that may be of use in conducting such hearing and in rendering your decision thereon, which consist of seven bundles of papers consecutively lettered in red ink from "A" to "G" inclusive, and you will allow examination thereof by the parties or their atterneys, and copies thereof to be taken by them, but you will not allow them to be removed from your possession, and will return all of them to this office with the evidence submitted at the hearing hereby ordered and evidence of service of notice of said departmental decision.

Resident counsel for both parties have been notified hereof.

Very respectfully,

BINGER HERMANN,
Commissioner.

908 G.

S W. W. T. S. Doc. 2, 536. T. W. A.

(Copy.)

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *November* 18, 1902.

MELDER
vs.
WHITE.

Involving the N. W. ¼ S. W. ¼ Sec. 2 T. 55 N., R. 2 E., B. M., Idaho.

Register and Receiver, Coeur d'Alene, Idaho.

GENTLEMEN: This case has been pending before the land department for more than six years, and in order that a connected view may be had of the matter, it becomes necessary to state the action that has hitherto been taken.

On November 27, 1895, the day on which the township plat was filed, John E. White made homestead entry No. 958 for the N. ½ of S. W. ¼ and lots 5 and 6, Sec. 2, T. 55 N., R. 2 E., and on the same day, but after White's entry was recorded, Henry Melder, as probate judge of Kootenai County, Idaho, applied to file a townsite declaration statement, with a plat of the town of Clarks Fork attached, for the N. W. ¼ S. W. ¼ of said section, which was rejected

for reason of conflict with White's entry. On January 8,
909 1896, Melder as probate judge, in behalf of the townsite claimants, filed an affidavit of contest asking the cancellation of White's entry, on the ground that the land had been used and occupied for townsite purpose since the year 1884, and that the entry was made for speculative purposes.

A hearing was had at your office on May 14, 1896, decided that the townsite claimants had no legal right to the land, but that, as a matter of equity, they should be protected to the extent of the ground actually occupied and improved by them, to which end your office held that White's entry should be held intact, provided he would agree to convey, after patent, about two acres of the land to the probate judge in trust for the benefit of the townsite occupants.

Both parties appealed from the decision of your office, and on February 6, 1897, this office held White's entry for cancellation as to the entire N. W. ¼ S. W. ¼, which decision was adhered to, upon a motion for review, May, 12, 1897. An appeal having been taken by the entryman, White, the secretary of the Interior, on August 31, 1898, (not reported), affirmed the action of this office. A motion for review having been allowed, however, the Department on May 22, 1899 (28 L. D., 412), vacated its previous decision, and reversed the decision of this office of February 6, 1897, it being held in the decision of May 22, 1899, that White's rights were superior to those of the townsite claimants, and that his entry should remain intact.

910 On July 15, and September 2, 1899, the department refused to grant a rehearing, but stated in the decision of September 2, that this office was not precluded from directing an inquiry in the nature of a new contest, if a new cause of complaint had been presented. In promulgating the decision of September 2, 1899, this office held, however, on July 11, 1900, that the application for rehearing must — denied; and a motion for a review of this decision having been filed, the same was denied on March 28, 1901, and an appeal again taken to the Department by the townsite claimants.

In the meantime, however, final proof was offered by White on November 29, 1897, against which a protest was filed, in which it was alleged a mineral location had been made a part of the land.

White relinquished that portion of the claim in conflict with the mineral location, and the same having been segregated by survey, the land now embraced in the final certificate, No. 417, is described as the N. W. ¼ S. W. ¼ and lots 5 and 6 of Sec. 2, T. 55 N., R. 2 E.

On December 11, 1901, the Department directed that a further hearing be had in the case, to be limited to the following matters:

"First. What portion of the land in controversy was included within the claimed townsite settlement at the time of the allowance of White's entry?

911 Second. What was the character of the occupancy and improvements of the townsite claimants at the time of the allowance of White's entry?

Third. What portion of the land in controversy was included in

the claimed townsite settlement at the time of the submission of final proof upon White's entry?

Fourth. What was the character of the occupancy and improvements of the townsite claimants at the time of the submission of final proof upon White's entry?

Fifth. Did White, by act or declaration, between the allowance of his entry and the submission of final proof thereon, and if so to what extent, encourage or induce the townsite claimants to occupy or lands within the townsite settlement and to what extent, if any, did he acquiesce in such occupancy or improvements between the times named?

Sixth. Did White, between the dates last named, enter into any contract in writing with one Roberts, or any other person, whereby White agreed, upon obtaining title under his entry, to dispose of any of the lands in controversy for townsite purposes, or whereby White induced Roberts, or any other person, to refrain from participating in the assertion of the claim of the townsite people.

Seventh. What was the number of inhabitants and the value of the improvements in the claimed townsite settlement at the
462 time of allowance of White's entry and at the time of his submission of final proof thereon, respectively?"

The decision of the department was promulgated on January 14, 1902, and it having been represented that the Roberts had been one of the contestant's attorneys at the former hearing, by letter "A" of February 19, 1902, Special Agent L. L. Sharp was ordered to act in the place of the Register at the hearing which was held on March 26, lasting through April 2, 1902.

Your office of July 25, 1902, rendered a decision finding the facts to be substantially as follows: That the portion of the land in controversy included within the townsite settlement at the date of White's entry in 1895, was all that portion of the legal subdivision in contest which was platted as the townsite, but not the unplatted portion, which was occupied by White, though all of the subdivision was claimed by the townsite people, and that the same area was claimed at the time of the submission of White's final proof; that the improvements consisted of two or three buildings used for business purposes, and about ten dwellings, valued at seven or eight thousand dollars, the value being practically the same in 1897 as in 1895, there having been only a slight change in value; that the entryman, White, had not, between the date of his entry and the time of submitting final proof, encouraged or induced the townsite claim-
463 ants to occupy or improve the land, nor did he acquiesce in such occupancy and improvements, between said dates; that he did not enter into any contract with one Roberts, or any one else, whereby White agreed, upon obtaining title under his entry, to dispose of any of the land for townsite purposes, or whereby he induced Roberts or any one else to refrain from participating in the claims of the townsite people; and that there were within the claimed townsite settlement, on November 27, 1895, forty-five inhabitants, and on November 29, 1897, forty-nine inhabitants, including those on the right of way.

Your office in concluding held that, inasmuch as the Depart-

ment in its decision of May 22, 1899 (*supra*), had decided the question of property of settlement, and the effect of settlement upon the right of way of the railroad, the only points to be considered were those raised by the charges against White, and as the contestant's allegation were not supported by the evidence in that respect, you recommended that the protests be dismissed, and that White's entry be relieved from suspension and passed to patent.

The case is again brought before this office by the appeal of the townsite claimants.

Inasmuch as the secretary of the interior in ordering the rehearing in this case did not revoke any ruling of laws previously laid down, and directed that the evidence to be taken at the second hearing should be confined to certain questions raised by the affidavits filed in support of the application made by the town-
914 site claimants, for the new hearing this office does not feel that it would be justified in reaching any conclusions contrary to the views expressed by the Department in the decision of May 22, 1899 *supra*, unless such conclusion can be based upon the evidence submitted in accordance with the order for the second trial.

The finding of facts reached by your office seems to be substantially correct so far as the same can be ascertained from the somewhat contradictory testimony; and as the townsite claimants have according to this finding failed to establish their charges against the entryman White their protest against the issuing of patent upon his entry must be dismissed.

The decision of your office is, therefore, affirmed, subject to the right of appeal to the Department within sixty days from notice, and you will so advise the parties in interest in accordance with the rules of practice.

Very Respectfully,

W. A. RICHARDS,
Assistant Commissioner.

Title of Court and Cause.

Notice.

To the defendants in the above-entitled action and each of them, and to Messrs. Albert Allen and John P. Gray, attorneys for said defendants:

You and each of you are hereby notified that Judge Morgan has signed and made findings of fact and conclusions of law, and
915 judgment and decree in the above entitled action, all of which have been filed in the above entitled action with the clerk of the above-named district court, at Rathdrum, Idaho.

Dated this 22nd day of November, 1905.

H. M. STEPHENS,
Attorney for Plaintiffs.

Title of Court and Cause.

Notice of Intention to Move for a New Trial.

To the Plaintiffs in the above entitled action, and to H. M. Stephens, their attorney:

Take notice that the defendants in the above entitled action intend to move the Court to vacate and set aside the decision of the Court rendered in the above entitled cause, and to grant a new trial of the said cause upon the following grounds, to-wit:

(1) Insufficiency of the evidence to justify the decision of the Court, and that the decision is against law.

(2) Errors in law occurring at the trial, and excepted to by the defendants.

The said motion will be made upon a statement of the case hereafter to be prepared and served upon you.

Dated this 29th day of November, 1905.

916 JOHN P. GRAY &
ALBERT ALLEN,
Attorneys for Defendants.

Post office address of John P. Gray, Wallace, Idaho.
Post office address of Albert Allen, Spokane, Wash.

Title of Court and Cause.

STATE OF IDAHO,
County of Kootenai, ss:

I, Albert Allen, being duly sworn on oath, do say that I am one of the attorneys for the defendants in the above entitled action. That on the 30th day of November, 1905, at the city of Spokane, State of Washington, I personally served on H. M. Stephens, the attorney for the plaintiff in said action the notice of intention to move for a new trial herein, which was filed herein on the 29th day of November, 1905, by then and there delivering to and leaving with said Stephens, a true copy thereof, together with the endorsements thereon.

ALBERT ALLEN.

Subscribed and sworn to before me this 24th day of February, 1906.

[NOTARIAL SEAL.] T. L. QUARLES,
Notary Public.

(Endorsed:) "Filed Feb. 24, 1906. T. L. Quarles, Clerk District Court."

Title of Court and Cause.

Order.

On motion of the defendants in the above entitled action, it is ordered that the defendants have sixty days from and after
917 the date hereof in which to prepare, file and serve their proposed statement of the case, to be used on appeal and on motion for a new trial.

It is further ordered, that in the meantime, and until the hearing and determination of the motion for a new trial, all proceedings upon the judgment herein be stayed.

Dated November 28th, 1905.

R. T. MORGAN, *Judge.*

Endorsed: Filed November 29th, 1905. T. L. Quarles, Clerk of the District Court. By Jas. A. Foster, Deputy.

"The above and foregoing order was procured by the defendants and made by the court without any knowledge or notice to or on the part of the plaintiffs, and was and is an *ex parte* order."

Title of Court and Cause.

Order of Court.

On motion of the defendants in the above entitled cause it is hereby ordered, that the defendants have until and including the first day of March, A. D. 1906, in which to prepare, file and serve their proposed statement of the case to be used at the hearing of the motion for a new trial, herein and also upon appeal to the Supreme Court of the State of Idaho, should such appeal be taken.

It is further ordered that, in the meantime and until the
918 hearing and determination of the motion for the new trial herein a stay of proceedings upon the judgment herein shall be had. Signed and dated this 2nd day of January, A. D. 1906.

R. T. MORGAN,
District Judge.

Endorsed: "Filed January 23rd, 1906. T. L. Quarles, Clerk.

"The above and foregoing order was procured by the defendants and made by the court without any knowledge or notice to or on the part of the plaintiffs, and was and is an *ex parte* order."

Title of Court and Cause.

The defendants now refer to the pleadings, the findings of fact and conclusions of law, the orders of the Court, the judgment, and the other papers and proceedings in this case, and make the same

and each thereof a part and parcel hereof, to be used with this statement on the hearing of the motion for a new trial, and also on appeal herein, if appeal be had.

And now within the time allowed by the Court and the Judge thereof, and within the time allowed by law within which to file a statement herein, come the defendants and move the Court to set aside and vacate the findings herein, and to vacate and set aside the judgment and decree rendered on said findings, and to grant a new trial herein upon all and singular the grounds mentioned in the notice of intention to move for a new trial herein, and specify the particular errors upon which they rely and will rely in their motion for a new trial herein, to-wit:

919 *Specifications of Error upon which the Defendants Will Rely upon their Motion for a New Trial Herein to be Used on Appeal Herein in Case that a Motion for a New Trial is Overruled.*

The defendants specify the following errors of law occurring at the trial and excepted to by the defendants, and upon which they will rely, among other things, in their motion for a new trial, and motion to set aside and vacate the findings and judgment of the Court herein, to-wit:

1. The Court erred in overruling the defendants' demurrer to the amended complaint of the plaintiffs herein.

2. The Court erred in making the 25th finding of fact, which finding of fact is in words as follows, to-wit:

That the plaintiffs now are and at all the times hereinafter mentioned were the owners in fee and entitled to the immediate and exclusive possession of the following described tract, piece and parcel of land, situated, lying and being in Kootenai County, state of Idaho, to-wit: the northwest quarter of the southwest quarter and lots five (5), six (6) and seven (7) of section two (2), in township fifty five (55) north, range two (2) east, Boise meridian.

3. The court erred in making that portion of its 25th finding of fact wherein it was found that the possession of the defendants was wrongful and unlawful.

920 4. The Court erred in making that part of its 27th finding of fact wherein it is found that the premises and property were acquired by the plaintiffs by homestead entry, and in that part thereof wherein it is found that the plaintiffs were unable to bring suit because of contest and litigation pending in the land department of the United States.

5. The Court erred in making that part of the 28th finding of fact which found and stated that the value of the improvements removed from the premises by the defendant Gordon Daugharty were of the value of twenty-five hundred ($2500) dollars.

6. The Court erred in all of that part of the 29th finding of fact wherein it is stated that the plaintiffs were in constructive and legal possession of the whole of the premises in controversy on the 4th day of July, 1906.

7. The Court erred in making and finding the 30th finding of fact, which is in words as follows, to-wit:

That plaintiffs are entitled not only to the possession of the premises occupied by the defendants and each of them, but also to possession of the improvements upon the whole of the said property hereinbefore first described, and particularly the improvements upon the various portions above mentioned that the defendants and each of them occupy or have possession of.

8. The Court erred in making the 31st finding of fact, which is in words as follows, to wit:

921 That plaintiffs and their grantors were and have been seized and possessed of the property in question in this action within five years before the commencement of this action, and on the 4th day of July, 1903, when patent issued, defendants ousted plaintiffs from the possession of portions of the premises above described.

9. The Court erred in making the 32nd finding of fact, and in making each and every one of the paragraphs thereof.

10. The Court erred in making the 33rd finding of fact, and the whole thereof, and particularly that portion thereof wherein it finds that the reasonable value of the use and occupation of the premises occupied by the defendants, John Reed and Courtney Reed, his wife, was of the value of twenty-five (825) dollars per month from the 1st day of July, 1902.

11. The Court erred in making the 34th finding of fact, and particularly that part thereof wherein it was found that the reasonable value of the improvements moved off from the premises by the defendants Gordon Daugharty and wife was of the value of twenty-five hundred (8250/) dollars.

12. The Court erred in making the 35th finding of fact herein.

13. The Court erred in making the whole of the 37th finding of fact herein.

14. The court erred in making the 38th finding of fact
922 herein, and especially in finding that the officers of the Interior Department did not exclude any testimony, and in finding that there was in said land office and said department a full, and complete hearing.

15. The court erred in making the 39th finding of fact, and in finding that the officers of said interior department or of the land office or any or either of them, were not guilty of any fraud or any unlawful conduct.

16. The court erred in making its first conclusion of law herein, which is in words as follows:

That the plaintiffs are the owners in fee simple of the property involved in this action and of all improvements situated upon the said real estate, and are entitled to have the immediate, sole and exclusive possession of said property and the whole and every part thereof, and are entitled to recover the same, or any part thereof held by the defendants or either of them, from the defendants and each of them.

17. The Court erred in making its 2nd conclusion of law and the

ole thereof, and in finding that the plaintiffs are entitled to have
ainst the defendants herein judgment for the use and occupation
the premises, or of such portions as have been occupied and held
the defendants.

18. The Court erred in making its 3rd conclusion of law, and
ticularly that part thereof which finds that the plaintiffs are en-
ed to have against the defendants John Reed and Courtney D.
d, his wife, herein, judgment for the use and occupation of any
portion of said premises.

19. The Court erred in making its 4th conclusion of law
herein, which is in words as follows, to-wit:

That plaintiffs are entitled to judgment against defendants Gor-
Daugherty and Ida Daugherty, his wife, for the value of the
provements removed from a portion of the premises in con-
versy, as shown by finding of fact numbered twenty-eight
XVIII).

0. The Court erred in making its 5th conclusion of law, which
words as follows, to-wit:

That plaintiffs are entitled to a joint and several judgment against
defendants and each and all of them for their costs and disburse-
ts in this action.

1. The Court erred in making and finding its 6th conclusion of
which conclusion of law is in words as follows, to-wit:

That the findings of fact and all questions of mixed law and
made or found by the officers of the department of the interior
binding and conclusive upon this court, and no allegation has
made in the answer of the defendants or the cross complaint
he defendants or any evidence offered which authorizes this court
reinvestigate or relitigate the facts or any fact of this case which
raised or attempted to be raised by the answer or cross com-
nt or either of them herein, and the only issues of fact that are
in this court to determination between the plaintiff and de-
dant in this action are those relating to the matter of the use
occupation by the defendants of the premises in controversy, or
portions thereof as have been by the defendants severally oc-
ed and wrongfully detained by the defendants jointly and
rally.

22. The Court erred in making and finding the 7th con-
clusion of law herein, which is in words as follows, to-wit:

That the pleadings of the defendants herein or the evidence
ed by them, or either thereof, are not sufficient to authorize, per-
or warrant this Court to reinvestigate or relitigate the questions
act, or any question of fact, which have heretofore been pre-
ed to and litigated in or determined by the department of the
ior, or which might have been presented to, litigated in or de-
ined by said department or the officers thereof.

3. The Court erred in making and finding the 8th conclusion
w, which is in words as follows, to-wit:

hat the patent of the plaintiff's in this action transferred to them
egal fee simple and indefeasible title.

24. The Court erred in making and finding the 9th conclusion of law, which is in words as follows, to-wit:

That the defendants or either of them have no right, claim, title or interest in or to the property involved in this action, or any part thereof; and that the claims of defendants and each of them to the said property or any part thereof, or any other person by or through the defendants or any other person claiming under the alleged townsite claimants or any or either of them, under the laws of Congress, or any or either of them, are and each of them is without foundation therefor and of no force or effect whatsoever.

25. The Court erred in making and finding the 10th con-
925 clusion of law, which is in words as follows, to-wit:

That the improvements upon the property in controversy and involved in this action or any part thereof placed thereon by the defendants or either of them, or any person by, through or under whom the defendants or either of them, or hold or claim, or pretend to hold or claim, or put or placed upon said property by any of said alleged townsite claimants, belong to and are the property of the plaintiffs in this action.

26. The Court erred in making and finding the 11th conclusion of law, which is in words as follows, to-wit:

That upon the cross complaint of the defendants herein and the answer of the plaintiffs to said cross complaint, plaintiffs are entitled to have the title of and to said property involved in this action and the whole and every part thereof quieted, and any and every cloud cast or put thereon by the defendants or either of them removed and for naught held, and all the adverse claims of defendants or either of them, or any person claiming or to claim or hereafter claiming by, through or under the defendants or either of them, for naught held, cancelled and settled, and the title of the plaintiffs in and to the property and premises aforesaid and the whole and every part thereof, together with the improvements thereon, quieted in the plaintiffs and freed from any and every claim of the defendants and any and every person claiming or to claim by, through or under the defendants or either of them.

27. The Court erred in rendering and entering a judgment in favor of the plaintiffs and against the defendants.

926 28. Under the 2nd and 3rd subdivisions of Section 2258 of the Revised Statutes of the United States, and under section 2289 of said Revised Statutes of the United States lands included within the limits of an incorporated town, or selected as the site of a city or town, and lands actually settled and occupied for purposes of trade and business, and not for agriculture, were not open to settlement or occupation or entry under the preemption or homestead laws, and could not be entered or patented as a homestead, and the Court erred in not finding and deciding that the lands in controversy in this action, and described in the answer and cross complaint of the defendants herein, and occupied by them as a town-site, were not subject to entry or patent under the plaintiff's homestead entry, and also erred in not holding and deciding that the patent issued therefor to the plaintiff John E. White was issued contrary to law and was void.

Specifications of Particulars in Which the Evidence is Insufficient to Justify the Findings and Decisions of the Court.

1. The 25th finding of fact, which is in words as follows:

That the plaintiffs now are and at all the times hereinafter mentioned were the owners in fee and entitled to the immediate and exclusive possession of the following described tract, piece and
927 parcel of land, situated, lying and being in Kootenai County, State of Idaho, to-wit: the northeast quarter of the southwest quarter and lots five (5), six (6) and seven (7) of Section two (2), in township fifty-five (55) north range two (2) east, Boise meridian,

is contrary to the evidence, in this, that the evidence shows conclusively and is not disputed that the townsite of Clark's Fork, containing a railroad depot, hotel, postoffice, saloons, stores, restaurants and residences, existed upon the land long before the plaintiff, John E. White, settled upon his alleged homestead; that the pretended homestead claim of the plaintiff, John E. White, was within the limits of said townsite, and also shows that the premises in controversy in this action were occupied and used for purposes of business and trade, and not for agriculture, ever since long prior to the alleged settlement of the plaintiff, John E. White, and under said law of Congress above mentioned, the same was not open to entry or patent as a homestead, and could not legally be included within any patent issued by the land department to the said John E. White, and under said evidence the Court should have found and decided that the patent to the said John E. White for said premises was illegal and void.

2. Findings of fact number 26, 27, 28, 29, 30, 31, 32, 33, 34, 35 and 36 of the Court herein, are all contrary to the evidence in the same particulars as finding number 25 as above specified, and the said specification of particulars in which the evidence is in-
928 sufficient to justify said finding are repeated and referred to the others of said findings mentioned.

3. The first conclusion of law and the whole thereof is not sustained by the evidence, and is contrary to the evidence, and is contrary to law, in that the evidence is insufficient to show that the plaintiffs, or either of them, are the owners in fee simple or otherwise, of the property involved in this action, or at any time have been the owners thereof, or entitled to the immediate, sole or exclusive possession, or any possession, of said property, or the whole or any part thereof, or that they are entitled to recover the same or any part thereof held by the defendants, or either of them; and for the reasons in the objections and specifications of insufficiency of evidence hereinbefore set forth, and for the reason that under the evidence the Court should have found for the defendants, and that the defendants were entitled to the possession of the said premises described in their answer and cross complaint herein.

4. The second conclusion of law and every part thereof is contrary to law, and is contrary to the evidence, and is unsupported by the evidence, for the reasons which have been more particularly

hereinbefore set forth, and for the reason that the evidence did
justify the Court in making said conclusion.

5. The 3rd conclusion of law and every part thereof is contr
to law, and is contrary to the evidence, and is unsupported
929 the evidence, for the reasons which have been more part
larly hereinbefore set forth, and for the reason that the
dence did not justify the Court in making said conclusion.

6. The 4th conclusion of law and every part thereof is contr
to law, and is contrary to the evidence, and is unsupported by
evidence, for the reasons which have been more particularly her
before set forth, and for the reason that the evidence did not jus
th Court in making said conclusion.

7. The 5th conclusion of law and every part thereof is contr
to law, and is contrary to the evidence, and is unsupported by
evidence, for the reasons which have been more particularly her
before set forth, and for the reason that the evidence did not jus
the Court in making said conclusion.

8. That the 6th and 7th conclusions of law, and each of the
and the whole thereof, and every part thereof, are contrary to l
and are contrary to the evidence, and are unsupported by the
dence, for the reasons which have been more particularly her
before set forth, and for the reason that the evidence did not jus
the Court in making said conclusions, or either of them.

9. That the 8th conclusion of law, and every part thereof, is
supported by the evidence, and is against the evidence, and agai
law, for the reasons hereinbefore specified, and for the reason t
under the evidence in this case, showing that the land was sett
upon and occupied for purposes of business and trade, a
930 was within the limits of a townsite, long before the settlem
of the plaintiff upon the same, the patent issued to the pla
tiff therefor was void, and did not transfer to the plaintiff a leg
fee simple or indefeasible title, or any title at all, but on the c
trary the said patent was absolutely void, and conveyed no ti
whatever to the plaintiffs.

10. That the 9th, 10th and 11th conclusions of law found
the Court, and each of them, are not, nor is either of them support
by the evidence, and each of them is against the evidence a
against law, for the reasons which have been hereinbefore m
specifically set forth.

11. That the Court erred in making and rendering a judgme
or decree against the defendants, or either of them, for the reas
that the same is contrary to the evidence, and the evidence is
sufficient to sustain the same, and insufficient to show that the plai
tiffs were the owners of the land in controversy, and for the reas
that the patent upon which the plaintiffs claim title was and
under said Sections 2258 and 2259 of the Revised Statutes of t
United States, absolutely void.

Now come the defendants and make, propose, file and serve t
foregoing as their statement on motion for a new trial herein, t
gether with their exceptions and specifications of error relied up

on motion for a new trial, and on appeal herein, in case a new
931 trial be not granted; and ask that the foregoing statement be settled, signed and sealed as a true statement on motion for a new trial herein, and that said findings, judgment and decree be set aside, and a new trial be granted herein.

JNO. P. GRAY AND
ALBERT ALLEN,
Attorneys for Defendants.

Post office address of said Albert Allen, being Room 618, The Rookery, Spokane, Wash.

Post office address of said John P. Gray, being Wallace, Idaho.

Filed before settlement February 24, 1906.

T. L. QUARLES,
Clerk of Dist. Court,
By D. E. DANBY, *Dep'y.*

Title of Court and Cause.

STATE OF WASHINGTON,
County of Spokane, ss:

I, Albert Allen, being duly sworn, do say: That I am one of the attorneys for the defendants in the above entitled action; that on the 26th day of February, 1906, I served the proposed statement of the case, which was filed in the office of the clerk of the above Court, on the 24th day of February, 1906, upon H. M. Stephens, Esquire, the attorney for the plaintiff in the above entitled action, by then delivering a true copy thereof to E. T. White, a clerk for said H. M. Stephens in the law office of the said Stephens, in the city of Spokane, State of Washington, the said H. M.
932 Stephens being absent from his office, and I was informed by the said White, being somewhere in Seattle, in the State of Washington.

ALBERT ALLEN.

Subscribed and sworn to before me this 28th day of February, A. D. 1906.

[NOTARIAL SEAL.] W. S. GILBERT,
Notary Public in and for the County and State of Washington, Residing in Spokane, Washington.

Title of Court and Cause.

Come now the plaintiffs above named and object to the settling or certifying of statement of the case or bill of exceptions herein, upon the ground and for the reason that the Court has no jurisdiction so to do, that the time for filing or settling statement of the case or bill of exceptions has long since expired, and the court is without jurisdiction to settle or certify a statement of the case or bill of exceptions herein.

Order Settling Statements and Bill of Exceptions.

Now on this Thursday, May 3rd, A. D. 1906, this cause came
regularly to be heard before the court for the purposes of settli
the statement of the case and bill of exceptions and the court havi
heard the objections of the plaintiffs the settlement of the case a
bill of exceptions herein upon the ground and for the reas
933 that the court has no jurisdictions so to do and upon t
ground that the time for filing and settling the stateme
of the case and bill of exceptions herein has long since expired a
that the court is without jurisdiction to settle and certify the same.

And the court having heard the argument of counsel and bei
duly advised in the premises, it is ordered that said objection
and the same hereby is overruled and denied.

To which ruling of the court plaintiffs, by their counsel then a
there duly excepted and the exception is allowed.

Done in open court this 3rd day of May, A. D. 1906.

R. T. MORGAN,
District Judge.

Title of Court and Cause.

STATE OF IDAHO,
County of Kootenai, ss:

I, the undersigned, Judge of the First Judicial District of t
State of Idaho, in and for the County of Kootenai, do hereby certif
that the foregoing statement of the case and bill of exceptions h
this day been presented to me, and that the same contains all
the evidence given on the trial of the above entitled cause, togeth
with the exceptions of the respective parties taken on t
934 trial; and the same is as such statement of the case and b
of exceptions herein, signed, settled and allowed. And it
ordered that the clerk of this court file the same as a record in sa
cause.

Done in open court this 3rd day of May, A. D. 1906.

R. T. MORGAN,
District Judge.

Title of Court and Cause.

STATE OF IDAHO,
County of Kootenai, ss:

I, the undersigned, Judge of the First Judicial District of t
State of Idaho, do hereby certify that the foregoing statement of t
case and bill of exceptions in the above entitled cause was used a
considered by me upon the hearing on the motion for a new tri

in said cause; and that no other papers or documents of any kind were read or considered by me upon the hearing of said motion.

Dated this third day of May, A. D. 1906.

R. T. MORGAN,
District Judge.

(Endorsed:) "Filed after settlement, May 3rd, 1906. T. L. Quarles, Clerk Dist. Court."

635 Title of Court and Cause.

No. 1394.

Order Denying Motion for New Trial.

The motion and application of the defendants for a new trial in the above-entitled action came on regularly for hearing on the 4th day of May, 1906, plaintiffs and defendants appearing by their respective counsel, and before the hearing or argument of said motion, and over the objections of plaintiffs, the Court settled and certified the statement upon motion for new trial, which statement upon motion for new trial was settled and certified before hearing the argument upon said motion for new trial, and said statement was considered by the Court upon the hearing of said motion for new trial. And after hearing the arguments of counsel the Court took said motion under advisement, and the Court being now fully advised in the premises.

It is by the Court ordered that said motion of the defendants for a new trial herein be, and the same is hereby, denied and overruled, to which order of the Court the defendants except, and exception is allowed.

Done 2nd day of June, 1906.

(Signed) R. T. MORGAN,
District Judge.

Filed June 4, 1906.

636 Title of Court and Cause.

Notice of Appeal.

To the plaintiffs in the above-entitled action, and to H. M. Stephens, their attorney:

Take notice that John B. Whitcomb, surviving partner of the firm of Moses P. Whitcomb and John B. Whitcomb, copartners as Whitcomb Brothers; Martha Whitcomb, John Fleming, Mrs. — Casey, William Johnston and Hilma Johnston, his wife; A. H. Hasselroth and Wilhelmina Hasselroth, his wife; George Pyatt and Elsie Pyatt, his wife; Andrew Paulson and Alvena Paulson, his wife; John Kirke, Brocklin Dougharty and Nora Dougharty, his wife; Luke Cotter and Sadie Cotter, his wife; Jason Edwards and Julia Edwards,

his wife; Gordon Dougharty and Ida Dougharty, his wife; Mrs. Emma Lloyd, Le Roy H. Whitcomb and Nannie Whitcomb, his wife; Fred L. Johnston, James Canning and Blanche Canning, his wife; John B. Whitcomb, Frank Allen, T. B. McWilliams; Le Roy H. Whitcomb, as administrator of the estate of Moses P. Whitcomb, deceased, and Martha Whitcomb and Le Roy H. Whitcomb, as heirs at law of Moses P. Whitcomb, deceased, defendants in the above-entitled action, hereby appeal to the Supreme Court of the State of Idaho from the judgment and decree made and entered in said cause in the said District Court, dated the 14th day of November, 1905, and filed the 20th day of November, 1905, in favor of the plaintiffs and against the defendants in said action, and from the whole thereof, excepting that portion of said judgment and decree wherein the judgment is against the defendants, John Reed and Court-
937 ney D. Reed, his wife, for the sum of one thousand and ten ($1010) dollars; and excepting that portion of said judgment wherein the judgment is against the defendants, M. W. Caldwell and Alice Caldwell, his wife, for the sum of ten ($10) dollars; and excepting that portion of said judgment wherein the judgment is against the defendant, Charles Schindler, for the sum of ten ($10) dollars; and excepting that portion of said judgment and decree which adjudges the plaintiffs entitled to the possession of lands occupied by said five last-named defendants.

These defendants do also hereby appeal to said Supreme Court from the order of the judge of said District Court, filed in the above-entitled cause on the 4th day of June, 1906, refusing to grant a new trial in said cause, and from the whole of said order.

Dated this 3rd day of August, A. D. 1906.

JNO. P. GRAY AND
ALBERT ALLEN,
Attorneys for said Defendants Appealing.

Post office address of John P. Gray, Wallace, Idaho.

Post office address of Albert Allen, 618 Rookery Block, Spokane, Wash.

(Endorsed:) Received a copy of the within Notice of Appeal August 3rd, 1906. H. M. Stephens, Attorney for Plaintiff. Filed August 3rd, 1906. T. L. Quarles, Clerk District Court.

938 We, the undersigned, attorneys in the above-entitled action, do hereby certify that we have compared the foregoing transcript with the original files and records in said action, and we do certify that the foregoing transcript contains a full, true and correct copy and transcript of such original file and records in said entitled action, with which we have compared the said transcript as the same remains on file and of record in said clerk's office, and we do further certify that said transcript contains a full, true and correct copy of the Judgment Roll records and files in the action and the statement of the case settled in the action and used on the hearing of the defendants' motion for new trial in said action, and all papers used

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the hearing of said motion for new trial, and the order of the rt overruling and denying said motion for new trial and the ptions thereto, and the notice of appeal served and filed therein the proof of service thereof as the same remains of record in clerk's office.

'e do further certify that on the 3rd day of August, 1906, the ndants deposited with the clerk of said Court the sum of three dred dollars in money for costs and damages on appeal in lieu undertaking on appeal, to abide the event of the appeal from judgment as well as the appeal from the order denying the motion new trial.

——— ———,
——— ———,
Attorneys for Appellants.
——— ———,
Attorney for Respondents.

(Here follow diagrams marked pp. 939 to 943, incl.)

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944 *Record Entries.*

BOISE, IDAHO, *December 1st*, 1906

SUPREME COURT.

State of Idaho, ss:

Court met pursuant to adjournment.

Present: Hon. Charles O. Stockslager, Chief Justice; Hon. James F. Ailshie, Justice; Hon. Isaac N. Sullivan, Justice; and the officers of the court, when the following proceedings were had, to-wit:

No. 1266.

JOHN E. WHITE and ROBERTA WHITE, Respondents,
v.
JOHN B. WHITCOMB ET AL., Appellants.

Upon reading and filing the application of counsel for appellant in the above entitled cause, and it satisfactorily appearing therefrom that cause exists for granting a further extension of time in which to prepare, file and serve a transcript on appeal, it is now therefore ordered by the court that the appellants have, and they are hereby granted until December 15th in which to prepare serve and file their transcript on appeal.

BOISE, IDAHO, *March 9*, 1907.

(After Title of Court and Cause.)

The above entitled cause, which should have been placed on the calendar for the March Term of this court at Lewiston, was on this day ordered continued until the May term of court at Boise, by stipulation of respective counsel.

945 BOISE, IDAHO, *May 7*, 1907.

(After Title of Court and Cause.)

This cause having been heretofore set for hearing, now on this day the same was called, Albert Allen appearing as counsel for appellants, and H. M. Stephens appearing as counsel for respondents. After argument the cause was submitted and by the court taken under advisement.

BOISE, IDAHO, *June 15*, 1907.

(After Title of Court and Cause.)

This cause having been heretofore heard, submitted and taken under advisement by the court, and the court having fully considered the same, now on this day the cause was again called, and the de

cision of the court is delivered by Justice Sullivan to the effect that the judgment of the district court be modified.

It is therefore considered, adjudged and decreed by the court, that the judgment of the district court of the First Judicial District in and for the county of Kootenai in the above entitled cause be and the same hereby is affirmed in so far as it adjudges and decrees the respondents entitled to the immediate possession of the premises in controversy, and for all costs necessarily incurred in establishing respondents' action in ejectment, and that it be reversed as to that portion of said judgment granting independent and separate relief and judgments against the several appellants separately and individually, either for use and occupation or for removal of buildings and waste, and that the cause be remanded, with instructions to the trial court to enter an amended and modified judgment in favor of respondents and against appellants for the possession and restitution of the premises in controversy in accordance herewith. Costs on appeal are awarded in favor of appellants.

946 BOISE, IDAHO, *July* 9, 1907.

(After Title of Court and Cause.)

A petition for rehearing in this cause having been heretofore filed by appellants, and a motion for modification of the judgment herein as to costs on appeal having been filed by respondents, and the court having fully considered the same, now on this day it is ordered that said petition for rehearing and said motion be denied.

947 Filed June 15, 1907. I. W. Hart, Clerk.

In the Supreme Court of the State of Idaho, May Term, 1907.

JOHN E. WHITE ET AL., Respondents,
vs.
MOSES B. WHITCOMB ET AL., Appellants.

Extension of time to prepare statement—Notice of application for—Appeal from judgment—Insufficiency of evidence to support—When insufficiency of evidence may be considered on appeal from judgment—And when may be considered on appeal from order denying new trial—Improperly uniting causes of action—Misjoinder of parties defendant—Demurrer to complaint—Townsite on public domain—Homestead claimants—Decision of Secretary of Interior—Findings of fact by—Action in Ejectment.

1. Under the provisions of Section 4892, Revised Statutes, the respondent is not entitled to notice of application by appellant for an extension of time in which to prepare and file statement of the case.
2. Under the provisions of Section 4807, the insufficiency of the evidence to support the decision cannot be considered on an appeal from the judgment unless the appeal is taken within sixty days after the rendition of the judgment.

3. Under the provisions of said section, an appeal may be taken from an order denying a motion for a new trial within sixty days after the order is made and entered in the minutes of the court or filed with the clerk, and where the question of
948 the insufficiency of the evidence to support the verdict or decision is properly raised, it may be determined on an appeal from such order, although the appeal from the judgment is not taken within sixty days after its rendition.

4. Under the provisions of Section 1169, Revised Statutes, a plaintiff may unite several causes of action in the complaint to recover specific real property, with or without damages, for withholding the same or for waste committed thereon and the rents and profits thereof, where the same judgment is asked against all of the defendants.

5. Under the provisions of said section, where a number of parties have at divers times and without concert of action or collusion, gone upon a certain tract of land and each taken severally a part thereof and erected improvements thereon, and one or more of the parties have individually and on their own account removed certain improvements placed thereon by himself, a cause of action for such removal against such defendant cannot be joined with an action against all of the defendants for a restitution of the entire premises.

6. The demurrer to the complaint should have been sustained, on the ground that several causes of action were improperly united, and the plaintiff given permission to amend his complaint and to set forth the causes of action upon which he relied.

7. Where the Secretary of the Interior under a contest proceeding between W. and the Probate Judge on behalf of townsite claimants, has found as a fact that W.'s claim to the land in controversy was prior to that of the town-site claimants', this Court would not be justified in holding that W. held the title thereto procured from the government as trustee for the town-site claimants.

8. Under the provisions of Section 2387, Revised Statutes of the United States, land settled upon, occupied and used for town-
949 site purposes and for trade and business, is not subject to entry under the homestead laws of the United States.

9. Where one party has acquired the legal title to property to which another has the better right, a Court of equity will convert him into a trustee of the true owner and compel him to convey the legal title to the equitable owner.

10. In this matter, the Secretary of the Interior has found as a fact that W.'s claim to said land was prior to that of the town-site claimants' and for that reason this Court would not be justified in holding that W. held said legal title as trustee for the town-site claimants.

(Syllabus by the Court).

Appeal from the District Court of Kootenai County. Hon. Ralph T. Morgan, Judge.

Action in ejectment and for damages. Judgment for plaintiff. Modified.

Albert Allen and John P. Gray for appellants.

H. M. Stephens and F. B. Kinyon for respondents.

SULLIVAN, *J.*:

This is an action in ejectment to recover possession of the N. W. ¼ of the S. W. ¼ and Lots 5, 6 and 7, of Section 2, Twp. 55 N. of R. 2 West of B. M., in Kootenai County. An amended complaint was filed and will hereafter be referred to as the complaint.

After alleging the ownership, in fee, in the plaintiffs, it is alleged that the defendants are wrongfully and unlawfully in possession of small portions of the tracts above described, and have used and occupied the same for a long period of time; that the premises were acquired by plaintiffs by homestead entry, final proof being made on the 27th of November, 1897, and that a patent was issued therefor on July 14th, 1903; that the defendant, Gordon Dougharty, 950 removed from a portion of said premises lasting improvements of the value of $3,000 and judgment is prayed against all of the defendants for the recovery of the possession and for $250 per month damages from November 27th, 1897, for the use and occupation of the premises, and for a separate judgment against said Dougharty for the sum of $3,000 for buildings alleged to have been removed by him from said premises.

The defendants demurred to the complaint, first, on the ground of misjoinder of parties defendant, in that it appeared on the face of the complaint that the defendants severally occupied distinct and separate tracts or portions of said premises, and that defendants do not occupy any portion thereof jointly, and that plaintiffs demand judgment against all of the defendants jointly for the sum of $250 per month from November 27th, 1897, for the use and occupation of said premises, while it appears that the defendants occupy small tracts of said premises in severalty and not jointly, and that one of said defendants cannot be held for the use and occupation of the others and that a cause of action against defendants in ejectment and for the use and occupation of said premises is joined against the defendant Dougharty for wrongfully removing improvements from said premises of the value of $3,000; secondly, that several causes of action have been improperly united in this: That it appears on the face of the complaint that the defendants severally occupied separate and distinct parts or portions of that land described in said complaint and do not occupy any part or portion thereof jointly; and that the plaintiffs claim to recover from the defendants jointly $250 per month for the use and occupation, whereas said complaint shows that the defendants occupy small parts or tracts in severalty and separately and not jointly; and it also appears that the cause of action in ejectment against all of the de-

fendants and the cause of action in tort against the defend-
951 ant Dougharty for removing improvements, are improperly joined; and thirdly, that the complaint described four certain forty acre tracts of land and does not specify or describe the small lots or tracts occupied by the defendants or specify in which of the four forty acre tracts of land described the small portions occupied by the defendants are situated, and does not describe from what portion of the land the defendant Dougharty removed permanent and lasting improvements; and fourthly, that said complaint on its face does not state facts sufficient to constitute a cause of action against the defendants or either of them.

Said demurrer was overruled by the Court. The defendants thereupon filed their answer and cross complaint, whereby they admitted certain allegations of the complaint and denied others, and in the second paragraph of the answer, they denied that they, or either of them, are now or ever have been in possession of said Lots 5, 6 and 7 or any part thereof, or that they have been in possession of said N. W. ¼ of the S. W. ¼ of said Section 2 lying South of the right of way of the Northern Pacific Railroad and East of the county road, and disclaim all interest therein; and deny that the plaintiffs or either of them are now or ever were the owners in fee or otherwise, or entitled to the immediate or exclusive possession or any possession of any part of said lands, except said Lots 5, 6 and 7, and that part of the N. W. ¼ of the S. W. ¼ of said section, lying South of the right of way of the Northern Pacific Railroad and East of the county road; and admit that the defendants severally and each for himself has used and occupied portions of said N. W. ¼ of the S. W. ¼ of said section for a long period of time.

In their cross complaint the defendants allege, among other things, that in the year 1884, while said premises were a part of the unsurveyed public land of the United States and long before any settlement was made by the plaintiffs thereon, that the part
952 of the premises above described as the N. W. ¼ of the S. W. ¼ of said Section 2 was settled upon, occupied, appropriated and used as a town-site for town-site purposes and for purposes of trade and business, and was then and ever since has been known as the town of Clark Fork; that said town then contained and ever since has contained a population of about one hundred inhabitants and then contained and ever since has contained a public railroad depot, a United States postoffice, hotels, saloons and residences; that said town was and is situated at the point where the Northern Pacific Railroad crossed the Clarks Fork of the Columbia River, and at all times was and is the center of the shipping and supply point of a large area of country in which the business of lumbering, mining and farming are carried on; that the defendants and each of them are now residents and occupants of said town and that they and their grantors and predecessors in interest have been residents and occupants of said town ever since long before the plaintiffs or either of them settled upon said land; that on November 17th, 1890, the plaintiff John White was station agent of the Northern Pacific Railway Co. at said town of Clarks Fork; that he claimed 160 acres

of land lying South of the Northern Pacific Railroad track and that he marked the boundaries thereof on the ground and erected a dwelling house thereon and he and his wife have since resided in said house; that said 160 acres of land so claimed and the boundaries so marked included within its boundaries that part of what is known as the N. W. ¼ of the S. W. ¼ of said Section 2 lying South of said railroad right of way, and East of the county road and contained five and 94 100 acres of said forty acre tract, and that said plaintiff did not at any time prior to the 27th day of November, 1895, claim any portion of said forty acre tract other than the part lying South of said railroad right of way and east of the county road; and
953 then proceeds to set up the facts showing what was done thereafter by the occupants of said land, and avers that said premises was settled upon and occupied for purposes of trade and business and as and for a town-site, and also alleges that on the 27th day of November, 1895, the plaintiff, John White, with intent to cheat and defraud the said town-site occupants and to obtain title to said lots, buildings and improvements of said town occupants, made a homestead entry for the lands described in the complaint, falsely claiming that the same was unappropriated public lands.

It was also alleged that on the 8th day of January, 1896, the Probate Judge of said County entered a contest against the homestead entry of White in so far as the same included said N. W. ¼ of the S. W. ¼ of said Section 2; that said contest was decided by the register and receiver in favor of said White; that an appeal was taken from their decision to the Commissioner of the general land office, who affirmed the decision of the register and receiver; and that an appeal was taken from the decision of said commissioner to the Secretary of the Interior who affirmed the decision of the commissioner and awarded said land to said White; that thereafter the Secretary of the Interior ordered a further hearing and additional testimony to be taken in said matter, which was done and thereafter the Secretary of the Interior finally decided said contest in favor of said White and awarded him a patent for said lands.

Defendants further allege that the undisputed facts show that said lands upon which said town-site was situated were occupied and used as a town-site for purposes of business and trade and not for agriculture; and thereafter, notwithstanding the law and facts, it was held by the Secretary of the Interior that said land was subject to entry under the homestead laws, and allege that said decision was erroneous and contrary to law; and that by said erroneous
954 decision, White wrongfully and illegally obtained title to said town-site, when in equity and good conscience, under the laws of the United States, the patent should have issued to said Probate Judge in trust for the several use and benefit of the occupants thereof according to their respective interests, and pray for judgment to the effect that the plaintiffs hold the legal title to said lands included within the limits of said town-site in trust for the several use and benefit of the occupants thereof.

The plaintiffs answered the cross complaint and denied nearly

all of its allegations and attached to their answer the decision of the Secretary of the Interior.

Upon the issues thus made, the cause was tried before the Court without a jury and judgment was entered in favor of plaintiffs and against the defendants, adjudging the plaintiffs to be the owners in fee of all of the land described in the complaint and that they were entitled to recover the same or any part thereof held by the defendants or either of them, and also adjudging that plaintiffs recover of the defendants severally certain sums for the use or occupation of the premises occupied by them severally and judgment against the defendant Dougharty and wife for the sum of $2510 for use and occupation and the value of certain improvements removed by them, and quieted the title in the plaintiffs and for costs of suit. A motion for a new trial was made and overruled. This appeal is from the judgment and the order overruling the motion for a new trial.

Counsel for respondents have made a motion to strike the statement of the case from the transcript upon the grounds that the same was not filed or served within the time required by law, and because the trial judge did not have jurisdiction or authority to settle or certify the same.

It seems that the trial judge extended the time for the preparation, service and filing of the statement without notice to
955 counsel for respondents, and it is contended under the provisions of Section 4892 of the Revised Statutes that notice of all proceedings after a party has appeared in an action, must be given and that under the provisions of said section, the respondents were entitled to notice of the application for an extension of the time to file the statement. Section 4892 is as follows:

"A defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him. After appearance, a defendant or his attorney is entitled to notice of all subsequent proceedings of which notice is required to be given. But where a defendant has not appeared, service of notice or papers need not be made upon him unless he is imprisoned in the action for want of bail."

That section provides, among other things, that after appearance a defendant or his attorney is entitled to notice of all subsequent proceedings of which notice is required to be given. We have no statute requiring notice to be given on an application for an extension of the time in which to prepare and serve a statement on motion for a new trial, nor have we any rule of court to that effect and for that reason the provisions of said section do not apply, and under our statute and rules no notice of such application is required to be given. This Court held in Peter *v.* Kalez, 11 Idaho, 553, that the adverse party was entitled to notice of the time and place of the hearing of a motion for a new trial. That was on the ground that the statute clearly contemplates notice of hearing to the adverse party of a motion for a new trial.

It is also contended by counsel for the respondents that this court cannot consider the sufficiency of the evidence for the reason that

appeal was not taken within sixty days after the rendition of the judgment, and bases this contention on the provisions of Section 4807, Revised Statutes as amended by Session Laws 1899, page 273. That section provided that an appeal may aken to the Supreme Court from a District Court, from a final gment within one year after the entry of the judgment, but an ption to the decision of verdict on the ground that it is not sup- ed by the evidence cannot be reviewed on appeal from the judg- t unless the appeal is taken within sixty days after the rendition ne judgment. It also provides, among other things, that an ap- may be taken from an order granting or refusing a new trial in sixty days after the order is made and entered on the minutes ne court or filed with the clerk.

here are two appeals in this case: one from the judgment and from the order denying the motion for a new trial On the ap- from the judgment, as it was not taken within sixty days after endition, an exception to the decision on the ground that it is supported by the evidence, cannot be reviewed on this appeal; as one of the grounds of the motion for a new trial was the in- ciency of evidence to support the decision of findings of the t and the appeal from that order was taken within sixty days, etermining that appeal the question of the sufficiency of the evi- e to support the decision of the court may be considered and mined.

often occurs that there is a large amount of evidence introduced ne trial of a case and that the stenographer is not able to tran- e his notes thereof until more than sixty days after the judg- has been rendered, and perform the other duties devolving upon in the meantime, and in such cases to hold that the question e sufficiency of the evidence could not be gone into unless the al was taken within sixty days of the rendition of the judgment, d require two separate appeals in case an appeal is taken from the order denying the motion for a new trial.

It has been the practice of this court whenever the suffi- ciency of the evidence to support the decision is raised, to e that question either when the appeal is taken from the judg- within sixty days after its rendition, or when the appeal is from the order denying a new trial within sixty days after order is made. There is nothing in the contention that the iency or insufficiency of the evidence cannot be considered on l from an order denying a new trial unless the appeal from the ment is taken within sixty days after its rendition.

order that this case may be fully understood, we shall make a ment of many of the facts arising out of this controversy.

appears from the record that in 1882 and 1883 the Northern ic Railroad was constructed through and over what afterwards d to be the N. W. ¼ of the S. W. ¼ of said Section 2, before f the parties hereto made settlement thereon and that its track s diagonally through said "forty," leaving a major portion on orth and the minor portion on the South side of the track, the n being located on the North side. Said Railroad Company

holds its right of way under the second section of the Act of July 2nd, 1864, 13 Stat. U. S., 365. Such right of way is 200 feet on each side of the center of the railroad track and the first improvements made at the said Clarks Fork station by the settlers were made under the impression that the railroad right of way was only 200 feet in width, or 100 feet on each side of the center of the track.

It appears that one Nagle located as a homestead in the year 18[illegible] all that portion of the tract in controversy North of the railroad track; that he cleared, improved and cultivated the same; that afterwards he established a general merchandise store thereon and continued to conduct the same up to the year 1889. In that year
958 a discovery of mineral was made near said land, which caused some mining excitement, when Nagle had a portion of the tract in controversy which was then included in what he claimed was his homestead, surveyed into lots and blocks. It appears that said lots and blocks in said plat commenced at a point 115 feet North of the center of the Northern Pacific Railroad track and that said lots were 110 feet deep; that he thereafter permitted other people to erect business buildings on the front row of lots, which buildings were erected on the right of way of the Northern Pacific Railroad Company, the owners believing that said right of way was only two hundred feet wide. The owners of such buildings continued in that belief up to sometime in 1893, when the Northern Pacific Railroad Company asserted its claim to the right of way four hundred feet wide and leased the ground upon which all of the business houses at Clarks Fork were located to the respective owners of said houses. The owners of such buildings thereafter, in the years 1894-5, removed their buildings off from the railroad right of way on to the land in controversy.

In 1891 the respondent, John E. White, located a part of the forty acre tract in controversy which was South of the Northern Pacific Railroad track and East of the wagon road running across said forty acre tract, and commenced the erection of a building thereon. He laid no claim whatever to any land North of the railroad track and west of said wagon road. He established his residence on the tract so claimed by him in 1892.

It appears that the appellant, M. P. Whitcomb, located as a homestead a small portion of the tract in controversy South of the Northern Pacific Railroad track and erected a house thereon and established his residence therein during 1892, and has continued to reside thereon. The government survey was extended over said land in
1893 and it appears that said tract of land remained from
959 1889 to 1893, with the store of Nagle, the hotel of Roberts, the saloon of Butler and other buildings located thereon, on the North side of the railroad track and on the right of way of the Northern Pacific Railroad Company, and the residence of White and the residence of Whitcomb on the South side of the railroad track. In the year 1894, the Northern Pacific Railroad Company refused to further lease its said right of way and notified those having buildings thereon to move them off, which they did sometime in the fall of 1894, except said Roberts who continued to lease from the Railroad

Company and his place of business was continued on the railroad right of way.

Thus the matter stood until October 26th, 1895, when notice was published that on and after the 27th of November, 1895, the official plats of said township would be on file in the local land office and that said office would receive filings and entries for lands in said township on and after said date. On October 29th, 1895, a petition was filed with the Probate Judge in and for Kootenai County, signed by ten persons claiming to reside on the tract in controversy, asking the Probate Judge to secure title to said tract as a town-site under the name of Clarks Fork. In pursuance of said petition, the Probate Judge caused a portion of the tract in controversy to be surveyed into lots and blocks, streets and alleys. It appears that Nagle, Butler and Whitcomb had declared their intention to enter said land as a homestead, but they failed to exercise whatever right they claimed as settlers under the homestead laws within the statutory period, and it thus appears that those parties who were engaged in business on the tract in controversy intended to enter the same under homestead laws, and it was held by the Secretary of the Interior that those parties could not be asserting and maintaining a claim to the tract in controversy under the homestead laws and under the town-site laws at the same time, and the conclusion reached by the officers of the land department, to wit, the Commissioner of the General Land Office and the Secretary of the Interior, was that White, having made his settlement and residence on said forty acre tract in 1891 was the oldest claimant thereto and entitled to enter the same under the homestead laws, and he was permitted to do so and a patent for said land was finally issued to White.

It is first contended that the Court erred in overruling the defendant's demurrer to the amended complaint. The grounds of the demurrer are above set forth. The first and second grounds are to the effect that it appears upon the face of the complaint that the defendants severally occupied distinct and separate portions of the premises and did not occupy any portion thereof jointly, and judgment is demanded against all of the defendants jointly for $250 per month for use and occupation, and to this is joined the cause of action against the defendant Dougharty for wrongfully removing permanent improvements.

It is contended that there is nothing in the complaint to show that the defendants were in any manner acting jointly or in collusion in holding the several distinct parcels of land and for that reason they could not be made jointly liable for the rental and use and occupation for the entire premises, and that if Dougharty, one of the defendants, wrongfully entered upon some portion of the land and removed improvements therefrom he could not legally be joined with the other defendants in an action of ejectment.

The cause of action against Dougharty for removing a building from said premises was not a cause of action against the other defendants as they were in no manner connected with Dougharty in that transaction. The allegations against Dougharty on account of the removal of said building do not state a cause of action against

any of the defendants except Dougharty and so far as that is
961 concerned, the demurrer to that cause of action might well have been sustained on the ground that it does not state facts sufficient to constitute a cause of action against Dougharty's co-defendants. We conclude that the cause of action against Dougharty for the removal of said building is improperly joined with an action in ejectment against Dougharty and his co-defendants, and that the complaint does not state a cause of action against all of the defendants on that point.

It appears from the judgment that the respondents are granted restitution from the defendants and each of them, and the plaintiffs are given judgment against Reed and wife for the sum of $1010, that sum being the reasonable value of the use and occupation of the premises held and wrongfully detained by them; and from Gordon Dougharty and wife the sum of $2510, that being the reasonable value of the use and occupation of said premises and the value of permanent improvements removed therefrom; and from the appellant J. B. Whitcomb the sum of $20; and judgment is entered against each of the other defendants severally in the sum of $10 for use and occupation of said premises, and for costs of suit taxed at $205.45, against each of the defendants separately and jointly.

It is contended by counsel for respondents that there is no misjoinder of parties defendant in this action, and in support of that contention cites subdivision 2 of Section 4169, Revised Statutes, which is as follows:

"The plaintiff may unite several causes of action in the same complaint where they all arise out of * * * (2) Claims to recover specific real property, with or without damages for the withholding thereof, or for waste committed thereon, and the rents and profits of the same: * * *"

It will be observed under the provisions of that subdivision that the plaintiff may unite several causes of action in the same complaint when the action is for the recovery of specific real property, with or without damages for withholding thereof, or for waste
962 committed thereon or for rents and profits of the same. It is clear to us that the provisions of that subdivision authorize the uniting of the causes of action therein enumerated when they are all against the same party or parties. But in a case like that at bar, where one party is charged with removing a building from the premises sought to be recovered and damages prayed therefor, it appears that the other parties had nothing to do with such trespass or were not connected with it in any way, they cannot be held for it. And where it also appears, as it does in this case, that the parties have gone independently of each other upon said premises and each taken on his own account and without the connivance or assistance of the others, a lot or piece of land and erected a house upon it, and the other defendants had nothing whatever to do with it, damages for such trespass can only be recovered against the party thus settling upon such tract of land. Such causes of action cannot be united.

It appears in this case that the costs amount to something over $200 and a joint and several judgment is entered against each and all of defendants therefor. Supposing that more than one-half of

those costs were made in procuring witnesses and establishing the alleged trespass of Dougharty for the removal of said building; it is not right that the other defendants who had nothing whatever to do with that matter should pay those costs.

It is clear that it was not intended by the provisions of said subdivision to authorize the uniting of causes of action for trespass or tort against one of the defendants and a cause of action for use and occupation of premises against each of the many defendants in this case with a cause of action for the restitution of said premises against all of the defendants. While the court erred in not sustaining the demurrer on that ground and should have required the plaintiff to amend, we take it for granted that the plaintiff would have
963 amended by striking out the separate causes of action against the other several defendants for the use and occupation of parts of said premises by each of them, and would have proceeded with the case upon the cause of action in ejectment against all of the defendants. An action in ejectment like this may be sustained against several defendants so far as the restitution of the premises is concerned, but an action for damages against each of several defendants for separate and distinct torts or trespasses, requiring judgments to be entered separately against them cannot be united with a cause of action based on ejectment against all of them. We shall, therefore, modify or set aside the judgment as to the tort or trespass of Dougharty for removing said building, and the separate judgment against each of the defendants for the use and occupation of said premises by each defendant, allowing the respondents a restoration of the premises without separate damages against the defendants severally for their trespass upon the land.

Referring again more particularly to the controversy in the Land Office, it appears that in 1893 the government survey was extended over said land and the plat thereof was filed in the United States Land Office in that district in 1895, and the Probate Judge of said county was intending to enter said land as a town-site. But it appears that on the very day he presented his application, the respondent White had entered the land under a homestead entry and the result was that a contest was entered in behalf of the town-site claimants which resulted in a decision in favor of White, and a patent thereafter issued to him. We have in the record the several decisions by the commissioner and Secretary of Interior in said matter, in which they find certain facts. They find that there were forty to fifty people living upon said tract of land at the time White made his entry and that there were improvements thereon consist-
964 ing of buildings, etc., of the value of seven or eight thousand dollars. It is also found that said land was not claimed as a town-site until after the survey was extended over it, and it is also found that said White made his settlement on the South-East part of said forty in 1891, and for that reason, and for the further reason that the town-site claimants who had settled upon that forty acre tract on the Northerly side of the railroad, had placed their buildings and improvements upon the railroad right of way, it was held that

they could not establish a town-site claim based on settlement and improvements on the railroad right of way.

In our view of the matter, this decision is very technical, for if White had made his settlement upon the railroad right of way, believing it to be only one hundred feet wide, he certainly would have been entitled to enter the land if he was the first settler and claimant, for under the law the railroad Company only had an easement over said land as long as they continued to use it for railroad purposes. The legal title thereof went to the entryman. As I understand from the record, White did not claim one-half of said forty,—probably not more than one-sixth. He is now given the whole forty acre tract regardless of the fact that the town-site claimants settled upon said land in perfect good faith prior to the time that White laid any claims to that part of said forty on the Northerly side of the railroad. It might have been justice that the Land Department gave to the parties in its decision, but there was certainly no equity in it. The other two claimants to portions of said forty acre tract waived their rights in favor of the town-site claimants and in justice to all of the parties, the town-site claimants should have been awarded the lots which they had settled upon and improved on the Northerly side of the railroad.

It is contended by counsel for the appellants that as White did not claim any portion of the land North of said railroad track and that as said town-site claimants had settled upon the same
965 for business purposes and had established a United States postoffice, hotel, stores and saloons before White made any claim thereto, that under the provisions of Section 2387 of the Revised Statutes of the United States, said land was set apart for town-site purposes and not subject to entry for agricultural purposes. Said Section is as follows:

"Whenever any portion of the public lands have been or may be settled upon and occupied as a town-site, not subject to entry under the agricultural pre-emption laws, it is lawful, in case such town be incorporated, for the corporate authorities thereof, and, if not incorporated, for the judge of the county court for the county in which such town is situated, to enter at the proper land-office, and at the minimum price, the land so settled and occupied in trust for the several use and benefit of the occupants thereof, according to their respective interests; the execution of which trust, as to the disposal of the lots in such town, and the proceeds of the sales thereof, to be conducted under such regulations as may be prescribed by the legislative authority of the State or Territory in which the same may be situated."

It will thus be seen that the main question in this case is whether the land in controversy was within the limits of a town-site or was selected as the site of a town and whether it was used for the purposes of business and trade and not for agriculture at the time respondents settled upon the same and claimed it under the homestead laws. It is contended by counsel for appellants that said land was so selected and occupied for town-site purposes, for business and trade, prior to the settlement of White and for that reason the home-

stead laws did not apply to the same and did not authorize the officers of the land department to permit an entry thereof under the homestead laws and for that reason the patent conveying the title to the respondent White was in trust for the occupants of said town-site.

966 If the forty acre tract in question had been entered by the Probate Judge as trustee for the town-site claimants under the provisions of said Section 2387 of the Revised Statutes of the United States, the title in fee to said railroad right of way would have passed to said trustee the same as it has to White. Under the provisions of the United States Statutes, homestead entries cannot be made upon lands within the limits of the town-site or selected as a site for a city or town, and the main contention in this case is that as said tract of land on the Northerly side of said railroad was occupied as a town-site for town-site purposes and for business and trade, the homestead laws did not apply to the same and did not authorize the officers of the land department to permit an entry thereon or to issue a patent therefor. See 6 Fed. Stat., Ann., p. 353.

Counsel contend that in such a case as the one at bar, the party to whom the legal title has been given holds it in trust for the town-site claimants, and cite Stark *v.* Starrs, 6 Wall., 402, wherein Justice Field in delivering the opinion said: "These are only applications of the well-established doctrine that where one party has acquired the legal title to property to which another has the better right, a court of equity will convert him into a trustee of the true owner and compel him to convey the legal title," and in support of that proposition cite John *v.* Towsley, 13 Wall., 72; Burfening *v.* Chicago St. P. etc. Ry., 163 U. S., 321.

The principle of law contended for as laid down in those cases is not questioned, but the serious difficulty in this case is the finding of the Land Department of the Government that White made settlement upon and has claimed said forty acre tract since 1891, and that was prior to the date that said land was claimed as a town-site. If the Land Department had found that said land was settled upon, occupied and claimed as a town-site prior to the settlement

967 and claim of White and under that state of facts had given the title to White, this Court would have been fully justified under the authorities cited, in holding that White was trustee for the town-site claimants; but as the Land Deparment has found as a fact that White's claim and right was prior to that of the town-site claimants, we would not be justified in holding that White was trustee for them. The decision of the Secretary of the Interior in that contest case will be found in 28 Land Decisions, page 412. If, as a matter of fact, White settled upon said forty acre tract and claimed it as a homestead prior to the time it was claimed as a town-site, under all decisions and holdings of the Land Department, White would have the prior right. We think that the facts found by the Land Department of the government in that matter are conclusive upon this Court and that under those facts we are not justified in holding that White holds the title as trustee for the town-site claimants.

We therefore conclude that the judgment in this case must be affirmed in so far as it adjudges and decrees the plaintiff entitled to the immediate possession of the premises in controversy and for all costs necessarily incurred in establishing plaintiffs' action in ejectment, and that it must be reversed as to that portion granting independent and separate relief and judgments against the several defendants separately and individually, either for use and occupation or for removal of buildings and waste. The cause will be remanded with instructions and directions to the trial court to enter an amended and modified judgment in favor of the plaintiffs and against defendants for the possession and restitution of the premises as above indicated.

Costs of this appeal are awarded in favor of appellants.

Ailshie, C. J., concurs.

968 Filed July 10, 1907. I. W. Hart, Clerk.

In the Supreme Court of the State of Idaho, May Term, 1907.

(On Petition for Rehearing.)

WHITE
v.
WHITCOMB.

Per Curiam:

The appellants have filed a petition for a rehearing in this case and urge as a grounds therefor that the decision of the Commissioner of the General Land Office and of the Secretary of the Interior was based upon an erroneous view of the law applicable to the case, and not upon a finding drawn from disputed facts. In other words, counsel contend that the undisputed facts in this case were all with the appellants in their several contests before the Land Office and the Department of the Interior. An examination of the decisions as found in the record and also reported in Land Decisions, and cited in the original opinion herein, will disclose that the Secretary found that White's settlement was prior to that of any of the townsite claimants. The decision of the Land Department seems to have turned upon that point, and that finding is binding upon all courts in a controversy like this where it is sought to hold the patentee as a trustee or equitable owner for other claimants. We have given this matter a further consideration and examination since the filing of the petition for rehearing and are satisfied that the opinion as originally announced disposes of the case, and the petition is therefore denied.

The respondents have also filed a petition for a modification of the judgment as to costs. They contend that the bulk of the record in this case is made up of the evidence produced by appellants, and that since the respondents' judgment has been affirmed as to the principal and main feature that the costs should at least be

969 divided. As we view the case the respondents should pay the costs of this appeal. They made it necessary for the appel-

lants to prosecute their appeal in order to obtain the relief that have been granted. In doing so it was necessary for the appellants to bring up the whole record, and while it contains much that is irrelevant and immaterial and has been encumbered with a great deal of useless matter, that is as much chargeable to the respondents as to appellants. We think the costs of this appeal should properly be borne by the respondents. The petition for modification of the judgment for costs is denied.

970 In the Supreme Court of the State of Idaho.

JOHN E. WHITE and ROBERTA B. WHITE, Respondents,

vs.

MOSES P. WHITCOMB and JOHN B. WHITCOMB, Copartners as Whitcomb Brothers; MOSES P. WHITCOMB and MARTHA WHITCOMB, His Wife; JOHN REED and COURTNEY D. REED, His Wife; M. W. CALDWELL and ALICE CALDWELL, His Wife; JOHN FLEMING, Mrs. —— CASEY, WILLIAM JOHNSTON and HILMA JOHNSTON, His Wife; A. H. HASSELROTH and WILHELMINA HASSELROTH, His Wife; GEORGE PIATT and ELSIE PIATT, His Wife; ANDREW PAULSON and ALVENA PAULSON, His Wife; JOHN KIRKE, BROCKLIN DOUGHARTY and NORA DOUGHARTY, His Wife; LUKE COTTER and SADIE COTTER, His Wife; WALTER FLEMING and ROSE FLEMING, His Wife; CHARLES SHINDLER, JASON EDWARDS and JULIA EDWARDS, His Wife; GORDON DOUGHARTY and IDA DOUGHARTY, His Wife; Mrs. EMMA LLOYD, ROY WHITCOMB and NANNIE WHITCOMB, His Wife; FRED L. JOHNSTON, JAMES CANNING and BLANCHE CANNING, His Wife; JOHN B. WHITCOMB, FRANK ALLEN, and T. B. MCWILLIAMS, Appellants.

Petition for Writ of Error.

Come now the above named John B. Whitcomb, surviving partner of the firm of Moses P. Whitcomb and John B. Whitcomb, co-partners as Whitcomb Brothers, Martha Whitcomb, John Fleming, Mrs. —— Casey, William Johnston and Hilma Johnston, his wife, A. H. Hasselroth and Wilhelmina Hasselroth, his wife, George Pyatt and Elsie Pyatt, his wife, Andrew Paulson and Alvena Paulson, his wife, John Kirke, Brocklin Dougharty and Nora Dougharty, his wife,
971 Luke Cotter and Sadie Cotter, his wife, Jason Edwards and Julia Edwards, his wife, Gordon Dougharty and Ida Dougharty, his wife, Mrs. Emma Lloyd, LeRoy H. Whitcomb and Nannie Whitcomb, his wife, Fred L. Johnston, James Canning, and Blanche Canning, his wife, John B. Whitcomb, Frank Allen, T. B. McWilliams, LeRoy H. Whitcomb, as administrator of the estate of Moses P. Whitcomb deceased, and Martha Whitcomb and LeRoy H. Whitcomb, as heirs at law of Moses P. Whitcomb, deceased, appellants, and say that on the 15th day of June, 1907, judgment in this case was entered by this court against the above named appellants remanding this cause to the trial court, to-wit, the District Court of the

First Judicial District of the State of Idaho in and for the county of Kootenai, with instructions and directions to said trial court to enter an amended and modified judgment in favor of the plaintiffs and against these defendants, your petitioners, for the possession and restitution of the premises described in the complaint herein, and for all costs necessarily incurred in establishing the plaintiff's action of ejectment; and that thereafter a petition for a rehearing was filed, presented, considered, and on the 9th day of July, 1907, denied by this court, whereupon said judgment became final.

That the said appellants, your petitioners, were and are aggrieved, in that, in the said judgment and the proceedings had prior thereto in this case certain errors were committed to their prejudice; that the plaintiffs claimed title to the lands in controversy in this case under a patent issued by the United States to the plaintiff John B. Whitcomb under the statutes of the United States relating to home-
972 steads upon the public lands; that the said appellants, your petitioners, claimed title and right of possession to said lands under the statutes of the United States relating to town sites upon the public lands of the United States; that by this action there was drawn in question the construction of certain of said statutes, and the decision of this court is against said title and right claimed by the appellants, your petitioners, and, as they believe, contrary to the statutes of the United States relating to the sale and disposition of lands to homestead settlers and the statutes of the United States relating to the sale of lands settled upon and occupied as a town site, and against the title and right of said appellants, your petitioners, thereunder, all of which will more fully appear in detail from the assignment of errors filed herein.

Wherefore, Your petitioners, the said John B. Whitcomb, surviving partner of the firm of Moses P. Whitcomb and John B. Whitcomb, co-partners as Whitcomb Brothers; Martha Whitcomb, John Fleming, Mrs. —— Casey, William Johnston, and Hilma Johnston, his wife; A. H. Hasselroth and Wilhelmina Hasselroth, his wife; George Pyatt and Elsie Pyatt, his wife, Andrew Paulson and Alvena Paulson, his wife; John Kirke, Brocklin Dougharty and Nora Dougharty, his wife; Luke Cotter and Sadie Cotter, his wife; Jason Edwards and Julia Edwards, his wife; Gordon Dougharty and Ida Dougharty, his wife; Mrs. Emma Lloyd, LeRoy H. Whitcomb and Nannie Whitcomb, his wife; Fred L. Johnston, James Canning and Blanche Canning, his wife, John B. Whitcomb, Frank Allen, T. B. McWilliams; LeRoy H. Whitcomb as administrator of the estate of Moses P. Whitcomb, deceased, and Martha Whitcomb and Le Roy H. Whit-
973 comb, as heirs at law of Moses P. Whitcomb, deceased, pray that a writ of error may issue to the Supreme Court of the state of Idaho for the correction of the errors complained of, and that a duly authenticated transcript of the record, proceedings and papers herein may be sent to the United States Supreme Court.

JNO. P. GRAY AND
ALBERT ALLEN,
Attorneys for Petitioners Above Named.

974 [Indorsed:] In the Supreme Court of the State of Idaho. John E. White and Roberta B. White, respondents, *vs.* Moses P. Whitcomb and John B. Whitcomb, *et al.*, Appellants. Petition for Writ of Error. Filed Aug. 2, 1907. I. W. Hart, Clerk.

975 In the Supreme Court of the United States.

JOHN B. WHITCOMB, Surviving Partner of the Firm of Moses P. Whitcomb and John P. Whitcomb, Copartners as Whitcomb Brothers; MARTHA WHITCOMB, JOHN FLEMING, Mrs. —— CASEY, WILLIAM JOHNSTON, and HILMA JOHNSTON, His Wife; A. H. HASSELROTH and WILHELMINA HASSELROTH, His Wife; GEORGE PYATT and ELSIE PYATT, His Wife; ANDREW POULSON and ALVENA P. PAULSON, His Wife; JOHN KIRKE, BROCKLIN DOUGHARTY, and NORA DOUGHARTY, His Wife; LUKE COTTER and SADIE COTTER, His Wife; JASON EDWARDS and JULIA EDWARDS, His Wife; GORDON DOUGHARTY and IDA DOUGHARTY, His Wife; Mrs. EMMA LLOYD, LE ROY H. WHITCOMB, and NANNIE WHITCOMB, His Wife; FRED L. JOHNSTON, JAMES CANNING, and BLANCHE CANNING, His Wife; JOHN B. WHITCOMB, FRANK ALLEN, T. B. McWILLIAMS, LE ROY H. WHITCOMB, as Administrator of the Estate of Moses P. Whitcomb, Deceased, and MARTHA WHITCOMB and LE ROY H. WHITCOMB, as Heirs at Law of Moses P. Whitcomb, Deceased, Plaintiffs in Error,

vs.

JOHN E. WHITE and ROBERTA B. WHITE, Defendants in Error.

Assignments of Error.

Come now the plaintiffs in error in the above entitled cause and aver and show that in the record and proceedings in said cause the Supreme Court of the state of Idaho erred to the grievous injury and wrong of the plaintiffs in error herein and to the prejudice and against the rights of the plaintiffs in error, in the following particulars, to-wit:

1. Under section 2387 of the Revised Statutes of the United States and other statutes of the United States relating to the sale and disposition of public lands, lands settled upon and occupied as a townsite, the lands in controversy in this action were not subject to entry under the agricultural preemption or homestead laws of the
976 United States; and under the undisputed facts in evidence before the Land Department of the United States in the contest before said Land Department wherein Henry Melder, the probate judge of Kootenai county, Idaho, was contestant, and John E. White was contestee, the land in controversy in this suit was settled upon and occupied as a townsite long before any attempted settlement thereon by said White; and thereafter the decision of the Land Department, being the decision of the Honorable Secretary of the Interior mentioned in the Answer and Cross Complaint of the plaintiffs in error, (defendants below) and set up in the answer of the

defendants in error (plaintiffs below) to said cross complaint missing the contest of the probate judge and awarding the lan White, was contrary to law and an erroneous construction of the as applied to the undisputed facts, and the Supreme Court of I erred in not holding said patent to be void.

2. Said Supreme Court of Idaho erred in not holding that u the statutes of the United States and under the undisputed fac the case the homestead entry of John E. White should have canceled and the probate judge allowed to enter the land in co versy in trust for the several uses and benefits of the town occup

3. Said Supreme Court of Idaho also erred in not holding tha title to the land in controversy acquired by said John E. Whit the patent issued to him should in justice and equity and accor to law belong to the town occupants.

977 4. The said Supreme Court of Idaho also erred in not ing and adjudging the title so acquired by said White held by him in trust for said town occupants.

5. The said Supreme Court of Idaho also erred in holding the finding of the officers of the Land Department that White's and right was prior to that of the townsite claimants precluded court from a consideration of that question. Such finding o Land Department was contrary to all of the evidence before the Department. The undisputed facts in the case show that the land settled upon and occupied as a townsite long before White's s ment, and that when White settled he marked out his claim o south side of the Northern Pacific right of way east of the co road, taking in none of the improvements of the townsite claim and he could not, after the land was surveyed, change his bound so as to take in the improvements of the townsite claimants.

6. The said Supreme Court of Idaho erred in affirming that of the judgment of the trial court which adjudged and decreed the defendants in error were entitled to the immediate posse of the land in controversy and for all costs necessarily incurre establishing the defendants in error's action of ejectment.

7. Said Supreme Court of Idaho also erred in remanding the to the trial court with instructions and directions to enter an ame and modified judgment in favor of the defendants in error (plai below) for the possession and restitution of the premises in troversy.

8. The said Supreme Court of Idaho erred in not reversing judgment of the trial court and not giving to the plainti
978 error their rights under the statutes and laws of the U States as townsite occupants on the public lands of the U States.

Wherefore, for this and other manifest errors appearing in record, the said plaintiffs in error pray that the judgment of the Supreme Court of the state of Idaho be reversed and set aside held for naught, and that judgment be rendered for the plainti

error granting them their rights under the statutes, and the laws of the United States; and plaintiffs in error also pray judgment for their costs.

JOHN P. GRAY,
Wallace, Idaho,
ALBERT ALLEN,
Spokane, Washington,
Attorneys for Plaintiffs in Error.

Indorsed: In the Supreme Court of the United States. John P. Whitcomb, *et al.*, Plaintiffs in error, *vs.* John E. White and Roberta B. White, Defendants in error. Assignments of Error. Filed Aug. 2nd, 1907. I. W. Hart, Clerk Supreme Court of Idaho.

979 In the Supreme Court of the State of Idaho.

JOHN E. WHITE and ROBERTA B. WHITE, Respondents,

vs.

MOSES P. WHITCOMB and JOHN B. WHITCOMB, Copartners as Whitcomb Brothers; MOSES P. WHITCOMB and MARTHA WHITCOMB, His Wife; JOHN REED and COURTNEY D. REED, His Wife; M. W. CALDWELL and ALICE CALDWELL, His Wife; JOHN FLEMING, Mrs. —— CASEY, WILLIAM JOHNSTON, and HILMA JOHNSTON, His Wife; A. H. HASSELROTH and WILHELMINA HASSELROTH, His Wife; GEORGE PIATT and ELSIE PIATT, His Wife; ANDREW PAULSON and ALVENA PAULSON, His Wife; JOHN KIRKE, BROCKLIN DOUGHARTY and NORA DOUGHARTY, His Wife; LUKE COTTER and SADIE COTTER, His Wife; WALTER FLEMING and ROSE FLEMING, His Wife; CHARLES SCHINDLER, JASON EDWARDS, and JULIA EDWARDS, His Wife; GORDON DOUGHARTY and IDA DOUGHARTY, His Wife; Miss EMMA LLOYD, ROY WHITCOMB, and NANNIE WHITCOMB, His Wife; FRED L. JOHNSTON, JAMES CANNING, and BLANCHE CANNING, His Wife; JOHN B. WHITCOMB, FRANK ALLEN, and T. B. MCWILLIAMS, Appellants.

Order Allowing Writ of Error.

Come now John B. Whitcomb, surviving partner of the firm of Moses P. Whitcomb, and John P. Whitcomb, co-partners as Whitcomb Brothers; Martha Whitcomb, John Fleming, Mrs. —— Casey, William Johnston and Hilma Johnston, his wife; A. H. Hasselroth and Wilhelmina Hasselroth, his wife; George Pyatt and Elsie Pyatt, his wife; Andrew Paulson and Alvena Paulson, his wife; John Kirke, Brocklin Dougharty and Nora Dougharty, his wife; Luke Cotter and Sadie Cotter, his wife; Jason Edwards and Julia Edwards, his wife; Gordon Dougharty and Ida Dougharty, his wife; Mrs. Emma Lloyd, Le Roy H. Whitcomb and Nannie Whitcomb,
980 his wife; Fred L. Johnston, James Canning and Blanche Canning, his wife; John B. Whitcomb, Frank Allen, T. B. McWilliams; Le Roy H. Whitcomb, as administrator of the estate of

Moses B. Whitcomb, deceased, and Martha Whitcomb and Le Roy H. Whitcomb, as heirs at law of Moses P. Whitcomb, deceased, the appellants above named, on this — day of August, A. D. 1907, and file and present to this court their petition praying for the allowance of a writ of error intended to be urged by them; and praying further, that a duly authenticated transcript of the record, proceedings and papers upon which the judgment herein was rendered may be sent to the Supreme Court of the United States; and that such other and further proceedings may be had in the premises as may be just and proper;

And upon consideration of said petition, this court desiring to give petitioners an opportunity to test in the Supreme Court of the United States the questions therein presented,

It is ordered by this court That a writ of error be allowed as prayed.

It is further ordered That before the citation issue herein the said petitioners give bond according to law in the sum of Three Thousand Dollars, which said bond shall operate as a supersedeas bond.

In testimony whereof, witness my hand this second day of August, A. D. 1907.

J. F. AILSHIE,
Chief Justice of the Supreme Court of the State of Idaho.

981 Indorsed: In the Supreme Court of the State of Idaho. John E. White and Roberta B. White, Respondents, *vs.* Moses B. Whitcomb, *et al.*, Appellants. Order Allowing Writ of Error. Filed Aug. 2nd, 1907. I. W. Hart, Clerk.

982 & 983 In the Supreme Court of the United States.

JOHN B. WHITCOMB ET AL., Plaintiffs in Error,
vs.
JOHN E. WHITE ET AL., Defendants in Error.

I, I. W. Hart, Clerk of the Supreme Court of the State of Idaho, do hereby certify that the foregoing, being 983 written and printed pages, numbered from I to VIII and 1 to 975, inclusive, is a full, true and correct copy of the records and proceedings in the above and therein entitled cause, as the same remains of record and on file in the office of the Clerk of said Court, and that the same constitutes a return to the annexed writ of error and citation.

I further certify that the cost of the foregoing return to the writ of error is Seventy-nine 75/100 Dollars, and that said amount was paid by Albert Allen, Attorney for Plaintiffs in Error.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Supreme Court of the State of Idaho this 24th day of September, A. D. 1907.

[Seal of Supreme Court, State of Idaho.]

I. W. HART,
Clerk of the Supreme Court of the State of Idaho.

984 In the Supreme Court of the United States.

No. —.

Writ of Error.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judges of the Supreme Court of the State of Idaho, Greeting:

Because in the records and proceedings as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Idaho, between John E. White and Roberta B. White, respondents, defendants in error, and John B. Whitcomb, surviving partner of the firm of Moses P. Whitcomb and John B. Whitcomb, co-partners of Whitcomb Brothers; Martha Whitcomb, John Fleming, Mrs. —— Casey, William Johnston and Hilma Johnston, his wife; A. H. Hasselroth and Wilhelmina Hasselroth, his wife; George Pyatt and Elsie Pyatt, his wife; Andrew Paulson and Alvena Paulson, his wife; John Kirke, Brocklin Dougharty and Nora Dougharty, his wife; Luke Cotter and Sadie Cotter, his wife; Jason Edwards and Julia Edwards his wife; Gordon Dougharty and Ida Dougharty, his wife; Mrs. Emma Lloyd, Le Roy H. Whitcomb and Nannie Whitcomb, his wife; Fred L. Johnston, James Canning and Blanche Canning, his wife; John B. Whitcomb, Frank Allen, T. B. McWilliams; Le Roy H. Whitcomb, as administrator of the
985 estate of Moses P. Whitcomb, deceased, and Martha Whitcomb and Le Roy H. Whitcomb, as heirs at law of Moses P. Whitcomb, deceased, appellants, plaintiffs in error, a manifest error hath happened to the great damage of the said plaintiffs in error, as by complaint doth appear; and We, being willing that errors, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid, and in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the 30th day of September, A. D. 1907, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid being then and there inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this August 2d, 1907.

[Seal United States Circuit Court, Idaho.]

A. L. RICHARDSON,
Clerk of the Circuit Court of the United States for the District of Idaho.

By —— ——.

Allowed this second day of August, 1907.

J. F. AILSHIE,
Chief Justice Supreme Court of Idaho.

986 [Endorsed:] In the Supreme Court of the United States. John B. Whitcomb *et al.*, Plaintiffs in error, *vs.* John E. White and Roberta B. White, Defendants in error. Writ of Error. Filed Aug. 2, 1907. I. W. Hart, clerk supreme court of Idaho.

987 UNITED STATES OF AMERICA,
Supreme Court of Idaho, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court, in the city of Boise, this 24th day of September, 1907.

[Seal of Supreme Court, State of Idaho.]

I. W. HART,
Clerk of the Supreme Court of the State of Idaho.

Costs of Suit.

Costs of plaintiffs in error $33, paid by John B. Whitcomb *et al.*

Costs of defendants in error $2.75, paid by John E. White and Roberta B. White.

Costs of transcript $79.75, paid by John B. Whitcomb *et al.*

I. W. HART,
Clerk of the Supreme Court of Idaho.

988 *Citation.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to John E. White and Roberta B. White, of Clarks Fork, Idaho, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C. on the 30th day of September, A. D. 1907, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Idaho, wherein John B. Whitcomb, surviving partner of the firm of Moses P. Whitcomb and John B. Whitcomb, co-partners as Whitcomb Brothers; Martha Whitcomb, John Fleming, Mrs. —— Casey, William Johnston and Hilma Johnston, his wife; A. H. Hasselroth and Wilhelmina Hasselroth, his wife; George Pyatt and Elsie Pyatt, his wife; Andrew Paulson and Alvena P. Paulson, his

wife; John Kirke, Brocklin Dougharty and Nora Dougharty, his wife; Luke Cotter and Sadie Cotter, his wife; Walter Fleming and Rose Fleming, his wife; Charles Schindler; Jason Edwards and Julia Edwards, his wife; Gordon Dougharty and Ida Dougharty, his wife; Mrs. Emma Lloyd; Le Roy H. Whitcomb and Nannie Whitcomb, his wife; Fred L. Johnston; James Canning and Blanche Canning, his wife; John B. Whitcomb, Frank Allen, T. B. McWilliams; Le Roy H. Whitcomb, as administrator of the Estate of Moses P. Whitcomb, deceased, and Martha Whitcomb and Le Roy H. Whitcomb, as heirs at law of Moses P. Whitcomb, deceased, are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

989 Witness, the Chief Justice of the Supreme Court of the State of Idaho, this 23d day of August, 1907.

J. F. AILSHIE,
Chief Justice of the Supreme Court of the State of Idaho.

Attest:

I. W. HART,
Clerk of the Supreme Court of the State of Idaho.

[Seal of Supreme Court, State of Idaho.]

SEPT. 3/07.

Rec'd copy of within & above citation.

H. M. STEPHEN,
One of the Att'ys for John E. White and Roberta B. White.

990 [Endorsed:] In the Supreme Court of the United States. John B. Whitcomb, *et al.*, Plaintiffs in Error, *vs.* John E. White and Roberta B. White, Defendants in Error. Citation on Writ of Error. Filed on return, Sept. 10, 1907. I. W. Hart, clerk.

991 In the Supreme Court of the United States.

JOHN B. WHITCOMB, Surviving Partner of the Firm of Moses P. Whitcomb and John B. Whitcomb, Copartners as Whitcomb Brothers; MARTHA WHITCOMB, JOHN FLEMING, Mrs. —— CASEY, WILLIAM JOHNSTON, and HILMA JOHNSTON, His Wife; A. H. HASSELROTH and WILHELMINA HASSELROTH, His Wife; GEORGE PYATT and ELSIE PYATT, His Wife; ANDREW POULSON and ALVENA P. PAULSON, His Wife; JOHN KIRKE, BROCKLIN DOUGHARTY, and NORA DOURHARTY, His Wife; LUKE COTTER and SADIE COTTER, His Wife; WALTER FLEMING and ROSE FLEMING, His Wife; CHARLES SCHINDLER, JASON EDWARDS, and JULIA EDWARDS, His Wife; GORDON DOUGHARTY and IDA DOUGHARTY, His Wife; Mrs. EMMA LLOYD, LE ROY H. WHITCOMB, and NANNIE WHITCOMB, His Wife; FRED L. JOHNSTON, JAMES CANNING, and BLANCHE CANNING, His Wife; JOHN B. WHITCOMB, FRANK ALLEN, T. B. MCWILLIAMS, LE ROY H. WHITCOMB, as Administrator of the Estate of Moses P. Whitcomb, Deceased, and MARTHA WHITCOMB and LE ROY H. WHITCOMB, as Heirs at Law of Moses P. Whitcomb, Deceased, Plaintiffs in Error,

vs.

JOHN E. WHITE and ROBERTA B. WHITE, Defendants in Error.

Bond.

Know all men by these presents, That we, John B. Whitcomb, Le Roy H. Whitcomb, Le Roy H. Whitcomb as administrator of the estate of Moses P. Whitcomb, deceased, A. Hasselroth, William Johnston, Hilma Johnston, Andrew Paulson, Alvena Paulson, John Kirk, Walter Fleming, Rose Fleming, James Edwards, Gordon Dougharty, Ida Dougharty and Emma L. Lloyd, of the County of Bonner, State of Idaho, as principals, and Herman Vogel and Reuben Johnson, as sureties, are held and firmly bound unto the above named John E. White and Roberta B. White, in the sum of Three Thousand ($3000.) Dollars to be paid to them, and for the payment of which well and truly to be made, we bind ourselves, our and each of us, our and each of our, heirs, executors and administrators jointly and severally, firmly by these presents.

Sealed with our seals and dated the 19th day of August, in the year of our Lord One Thousand Nine Hundred and Seven.

992 Whereas, the above named John B. Whitcomb, surviving partner of the firm of Moses P. Whitcomb and John B. Whitcomb, copartners as Whitcomb Brothers; Martha Whitcomb, John Fleming, Mrs. —— Casey, William Johnston and Hilma Johnston, his wife; A. H. Hasselroth and Wilhelmina Hasselroth, his wife; George Pyatt and Elsie Pyatt, his wife; Andrew Paulson and Alvena P. Paulson, his wife; John Kirke, Brocklin Dougharty and Nora Dougharty, his wife; Luke Cotter and Sadie Cotter, his wife; Walter Fleming and Rose Fleming, his wife; Charles Schindler; Jason Edwards and Julia Edwards, his wife; Gordon Dougharty and Ida

harty, his wife; Mrs. Emma Lloyd, Le Roy H. Whitcomb and ie Whitcomb, his wife; Fred. L. Johnston, James Canning and he Canning, his wife; John B. Whitcomb, Frank Allen, T. B. illiams; Le Roy H. Whitcomb, as administrator of the estate ses P. Whitcomb, deceased, and Martha Whitcomb and Le Roy hitcomb, as heirs at law of Moses P. Whitcomb, deceased, plain- n error, seek to prosecute their writ of error in the Supreme of the United States, to reverse the judgment rendered in the entitled action by the Supreme Court of the State of Idaho; w therefore, the condition of this obligation is such that if the named plaintiffs in error shall prosecute their writ of error to and answer all costs and damages that may be adjudged, if shall fail to make good their plea, then this obligation to be otherwise to remain in full force and virtue.

JOHN B. WHITCOMB.
LE ROY H. WHITCOMB.
LE ROY H. WHITCOMB,
As Administrator of the Estate of Moses P. Whitcomb, Deceased.

STATE OF IDAHO,
County of Bonner, ss:

rman Vogel and Reuben Johnson whose names are subscribed e above bond as sureties, being severally and duly sworn, each imself says: that he is a resident and freeholder of the State aho, and is worth more than the sum in said bond specified penalty thereof, over and above all his just debts and liabilities, operty not by law exempt from execution in this state.

HERMAN VOGEL.
[SEAL.] REUBEN JOHNSON.

bscribed and sworn to before me this 19th day of August, A. D.

HERMAN H. TAYLOR,
Notary Public in and for the State of Idaho, Residing at Sandpoint, Idaho.

is bond approved this 23rd day of August, A. D. 1907.

J. F. AILSHIE,
Chief Justice of the Supreme Court of the State of Idaho.

ndorsements:) In the Supreme Court of the United States. B. Whitcomb *et al.*, Plaintiffs in Error, *vs.* John E. White Roberta B. White, Defendants in Error. Bond. Filed Aug. 907. I. W. Hart, Clerk.

dorsed on cover: File No. 20,874. Idaho supreme court. No. 185. John B. Whitcomb, surviving partner of the firm oses P. Whitcomb and John B. Whitcomb, copartners as Whit- Brothers *et al.*, plaintiffs in error, *vs.* John E. White and rta B. White. Filed October 2d, 1907. File No. 20,874.

Office Supreme Court, U. S.
FILED.
MAY 4 1909
JAMES H. McKENNEY,

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 185.

JOHN B. WHITCOMB ET AL., *Plaintiffs in Error,*
v.
JOHN E. WHITE AND ANOTHER, *Defendants in Error.*

Supplement to Brief of Defendants in Error.

Section 2258, United States Revised Statutes (quoted on page 25 of brief for plaintiffs in error), was repealed by section 4, act of March 3, 1891, 1 supplement, second edition, page 942.

Act of March 3, 1877 (19 Stat., 392), having been codified in part by the Revised Statutes of the United States, section 1 thereof (quoted on pages 27-28 of brief for plaintiffs in error) was repealed by sections 5595-6, United States Revised Statutes.

Case of Burfenning *v.* C., St. P., etc., 163 U. S., 321, cited on pages 41-44 of brief of opposing counsel, arose prior to repeal of section 2258. The homestead claim was not initiated *by settlement*, but was a soldier's additional homestead entry under 2306, United States Revised Statutes. Besides, the city was incorporated by public act prior to the *homestead entry*, and the evidence of the reservation was shown by *public record*.

The case of Martin *v.* Nebraska, 21 Wallace, 660, also cited, involved a statute which reserved land "known to be mineral," and the *public record* showed the fact that the land was mineral.

These cases were both distinguished from the case at bar by the expression in the opinion:

"So the case was not one in which the *Department determined upon parol evidence* (as in the case at bar), but one in which it acted in disregard of an established and *recorded fact.*" (Italics and parentheses supplied.)

In the case of Root *v.* Shields, No. 12038 in 20 Fed. cases, cited by opposing counsel in oral argument, the entry of the patentee had been cancelled because he had previously been a participant of the town enterprise; after cancellation of entry the lots had been sold at public sale to other parties; and a subsequent secretary, without notice to such intervening purchasers, undertook to reconsider the action of his predecessor and issue a patent, and seemingly after the *incorporation* of the city.

Even under conditions obtaining prior to repeal of section 2258, in the absence of an incorporation or an *official plat on record*, there must have been actual occupancy for purposes of trade and business, and such occupancy on reserved lands does not except or reserve lands from *bona fide* settlement and entry. And plats made by private parties are not *recognized* or *encouraged;* but are contrary to the spirit and purposes of the townsite laws.

Lester's Land Laws, p. 432.
Milton Townsite *v.* Gann, 4 L. D., 584.
Keith *v.* Grand June., 3 L. D., 356.
Carson *v.* Smith, 12 Minn., 546, 558.
In Re Selby *et al.,* 6 Mich., 193, 205.

In last-mentioned case, act of Legislature seeking to have set apart to pre-emptor part of land in alleged townsite was held invalid as contrary to Federal statute.

Occupancy of land *without claiming under Federal statute* is not "an appropriation of it in the eye of the law;" a post-office and saloon is not "trade and business."

Matthewson & Ward *v.* Williams, 3 L. D., 282.

Probate Judge Indispensable Party.

Demurrer of defendants in error (R., 16) raised this proposition. (See sections 2148 to 2166, Revised Code of Idaho, 1908.) Defendants in error could not qualify as townsite claimants under section 2150, Idaho Code.

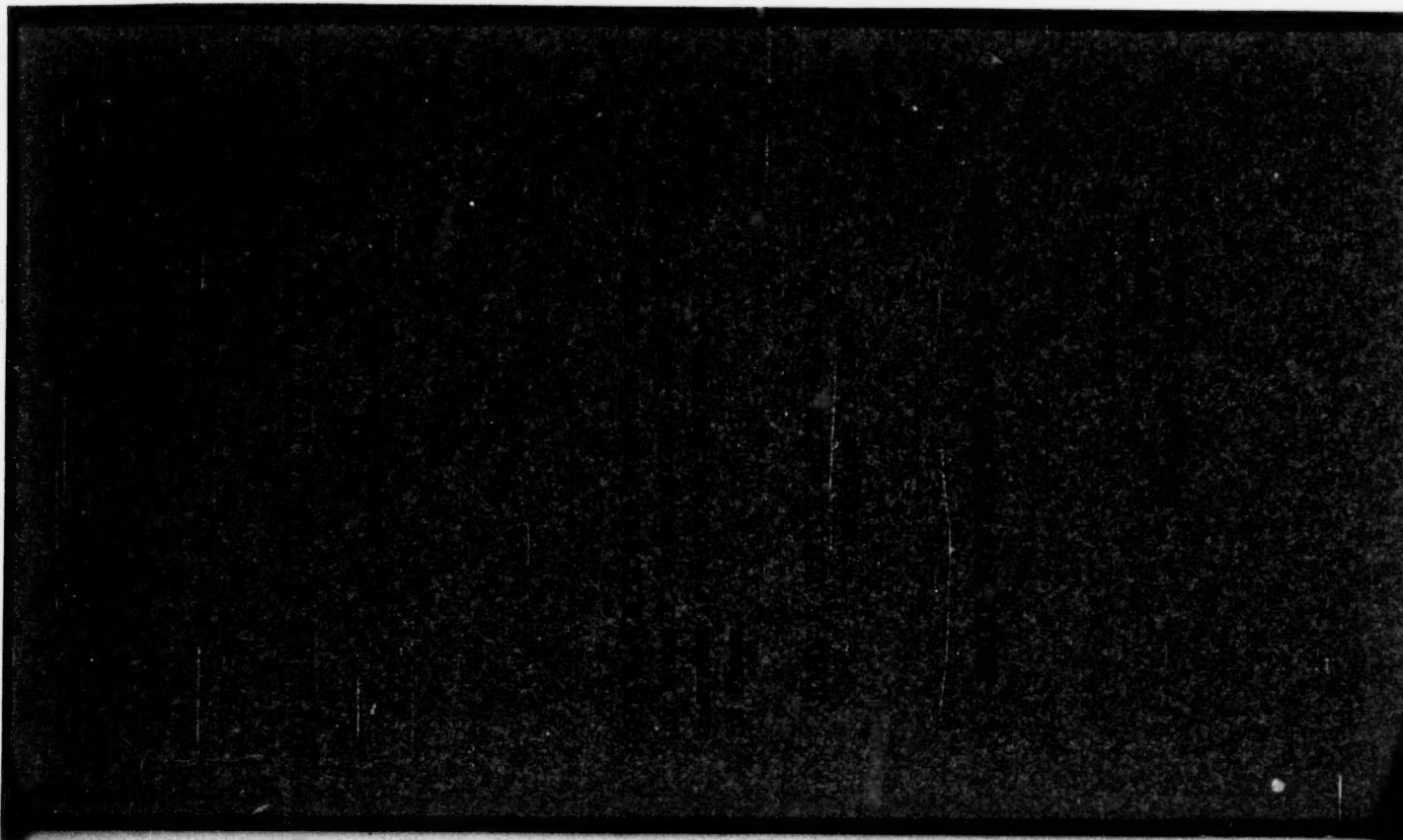
Cross-complaint Does Not Make Out Case.

Demurrer also raised insufficiency of averments of cross-complaint. Does not aver and record does not show that any townsite *declaratory statement*, required by section 2388, United States Revised Statutes, was ever filed, or that the price of the land was ever tendered by townsite claimant, as required by section 2387, United States Revised Statutes, or that the fees required by section 2394, United States Revised Statutes, were tendered, or that plat was ever filed with the recorder of the county under section 2382, United States Revised Statutes, or that plat was made by surveyor-general.

Paragraph VI (R., 12), cross-complaint, avers that "a *protest* or contest" was filed before the register and receiver January 8, 1896.

See authorities on page 34, our brief.

GEORGE H. LAMAR,
H. M. STEPHENS,
Counsel for Defendants in Error.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 185.

JOHN B. WHITCOMB, SURVIVING PARTNER OF THE FIRM OF MOSES P. WHITCOMB AND JOHN B. WHITCOMB, CO-PARTNERS AS WHITCOMB BROTHERS, ET AL., PLAINTIFFS IN ERROR,

vs.

JOHN E. WHITE AND ROBERTA B. WHITE, DEFENDANTS IN ERROR.

BRIEF FOR DEFENDANTS IN ERROR.

The case is presented upon writ of error to the Supreme Court of the State of Idaho (R., 493), issued by the clerk of the Circuit Court of the United States for the District of Idaho on August 12, 1907, upon petition therefor (R., 487) by plaintiffs in error, complaining of judgment of the Supreme Court of Idaho for the defendants in error, against the plaintiffs in error for the possession and restitution of the land in controversy, entered in said cause June 15, 1907 (R., 475-486), and the action of said court on July 9, 1907 (R., 486), in denying petition of plaintiffs in error for a rehearing, by which the Supreme Court of Idaho in effect affirmed the judgment and decree of the District Court for the First Judicial District of the State of Idaho in and for

the County of Kootenai, entered November 20, 1905 (R. 61-66), and based upon the findings of fact and conclusions of law of said lower court, made on November 11, 1905 (R., 53-61).

The defendants in error were plaintiffs in ejectment, and allege by their complaint (R., 2-6) that they hold the legal title under patent from the United States for the N. W. ¼ of the S. W. ¼ and lots 5, 6, and 7 of section 2, township 55 N., R. 2, Boisé meridian, Idaho, dated July 14, 1903, and issued under the homestead laws of the United States unto the said John E. White, Roberta B. White being interested only as his wife.

The plaintiffs in error were defendants to the complaint or declaration in ejectment and joined in an answer and cross-complaint (R., 8-16), in which they disclaimed all interest in the aforementioned land except that part of the N. W. ¼ of the S. W. ¼ of said section lying north of the right of way of the Northern Pacific Railroad and south of said right of way west of the county road (plat, R., 470).

The cross-complaint of plaintiffs in error avers as a fact that the part of the land claimed by them was occupied for purposes of trade and business long prior to the settlement and residence thereon by the defendant in error, John E. White, which they admit occurred in the year 1891, and that said White has since resided on a portion of the land embraced in the N. W. ¼ of the S. W. ¼ of said section 2; but they deny that he was a *bona fide* homestead claimant, and charge that his homestead entry was made for the purpose of cheating and defrauding the alleged townsite occupants of the land. They further aver that after the allowance of the homestead entry of said White, on November 27, 1895, the first day the land became open to homestead entry, the townsite claimants, acting through the proper probate judge of the county, initiated a contest before the Land Department of the United States, and that two separate hearings were had before the register and receiver of the

proper United States land office, whose decisions on each occasion were rendered in favor of the said homestead entryman, and on appeals to the Commissioner of the General Land Office and from the decisions of the General Land Office to the Secretary of the Interior, the Secretary of the Interior rendered two decisions in favor of the said homestead entryman, and that, pursuant to the last said decision, a patent was issued and delivered by the Land Department to the defendant in error, John E. White, based upon his said homestead entry, whereby the defendants in error obtained the legal title to all of the land embraced within his entry, including that claimed by the plaintiffs in error. They charge partiality on the part of the register and receiver and errors of fact and law in the decisions of the Land Department in favor of the entryman, and pray that the defendants may be declared to hold the legal title in trust for the plaintiffs in error or for the probate judge for the county in which the land is situated and crave a decree for a conveyance to the plaintiffs in error or the probate judge for their benefit.

By demurrer (R., 16-17) the defendants in error raised, among other things, the question of the legal capacity of the plaintiffs in error to sue for the affirmative relief craved in their cross-complaint, suggested "that the probate judge of Kootenai county, Idaho," is an indispensable party to such proceeding, that the complaint does not state facts sufficient to constitute a cause of action, and that the cross-complaint is ambiguous, unintelligible, and uncertain in particulars therein pointed out.

The demurrer having been overruled (R., 18), an answer was filed by defendants in error (R., 17-34), in which the adverse averments of the cross-complaints were fully denied, and to which was exhibited copies of the decision of the Secretary of the Interior, dated May 22, 1899 (R., 34-45), and the final decision by the Acting Secretary of the Interior, dated May 1, 1903 (R., 45-49), which contain findings of

fact by the Land Department of the United States to the effect that the homestead entry of the defendant in error was made in good faith pursuant to settlement anterior to the occupancy of the land or any part thereof for purposes of trade and business, and that the said John E. White had complied in good faith with the homestead laws of the United States. These decisions also dispose of certain mixed questions of fact and law in favor of the defendants in error.

There were positive findings of fact by the Land Department that until long after the initiation of the rights of said John E. White under the homestead laws of the United States there was no trade or business conducted on that part of the land not theretofore granted to the Northern Pacific Railroad Company as a four-hundred-foot right of way; that several years after the initiation of such rights under the homestead laws of the United States such persons as conducted business on said right of way were lessees of said railroad company; that long after Government survey, and up to within a short time of the filing of the plat and advertisement for entries to be made November 25, 1895, each and every of the persons who conducted business on the right of way, and who removed therefrom in the fall of 1894 and summer of 1895, intended to apply for and seek the same land under the homestead laws of the United States, and that it was an afterthought and contrary to the several intentions of the townsite claimants to make a townsite or seek the land under the townsite laws of the United States, and the Land Deparment held positively that neither the legal subdivision in question nor any part thereof was occupied for purposes of trade and business when the defendants in error settled and established their residence on said land under the homestead laws of the United States.

By agreement trial by jury was waived and the case was heard by the court. The plaintiffs in error, without charging or proving fraud on the part of the Land Department, undertook to attack its findings of fact, and introduced in evidence,

over objection of the defendants in error, the transcript of evidence taken at the two hearings before the register and receiver at the United States land office, which accounts for the voluminous record in the case.

The findings of fact (R., 52-59), conclusions of law (R., 59-61), and judgment and decree of the trial court (R., 61-66) were in favor of the defendants in error.

The findings of fact pertinent to the relief sought under the cross-complaint are found in findings 27, 35, 36, 37, 38, and 39, namely:

"That said premises and property were acquired by the plaintiffs (defendants in error) by homestead entry, and final proof was made on the 27th day of November, 1897, and patent issued therefor on July 14th, 1903" (XXVII, R., 55).

"That there was a contest in the United States land office and the Department of the Interior of the United States concerning said premises and property between the plaintiffs (defendants in error) and the defendants (plaintiffs in error) and their predecessors in interest, known and distinguished as the townsite claimants, in which contest plaintiffs (defendants in error) were successful, and the findings of fact of said Department and of the officers thereof were and are favorable to the plaintiffs (defendants in error) and against the defendants (plaintiffs in error) and their predecessors in interest and of *off* (all) of said townsite claimants" (XXXV, R., 58-59).

Finding XXXVI (R., 59) sets forth in full the decision of the Secretary of the Interior, dated May 22, 1899 (R., 34-45), and of the Acting Secretary of the Interior of May 1, 1903 (R., 45-49), as detailed findings of fact, which is followed by the finding XXXVII to XXXIX (R., 59), inclusive, as follows:

"That the finding or findings of fact or of any mixed question of fact and law was never made, determined, or decided inconsistent with the findings of fact hereinbefore set forth.

"That the officers of the Interior Department did not ex-

clude any testimony, and there was in said land office and said Department a full, fair, and complete hearing.

"That the officers of said Interior Department of said land office or any or either of them were not guilty of any fraud or any unlawful conduct."

The pertinent portions of the "judgment and decree" of the trial court are found in paragraphs XXIII to XXVI thereof, inclusive (R., 65-66), as follows:

"That the findings of fact and all questions of mixed law and fact made or found by the officers of the Department of the Interior are binding and conclusive upon this court, and no allegation has been made in the answer of the defendants or the cross-complaint of the defendants or any evidence offered which authorizes this court to reinvestigate or relitigate the facts or any fact of this case which were raised or attempted to be raised by the answer or cross-complaint or either of them herein." * * *

"That the pleadings of the defendants herein or the evidence offered by them, or either of them, are not sufficient to authorize, permit, or warrant this court to reinvestigate or relitigate the questions of fact, or any question of fact, which have heretofore been presented to and litigated in or determined by the Department of the Interior or which might have been presentd to, litigated in, or determined by said Department or the officers thereof.

"That the patent of the plaintiffs in this action transferred to them the legal fee-simple and indefeasible title."

Paragraph XXVI (R., 66) is to the effect that the plaintiffs in error have no rights, under the townsite laws of the United States, to the land or any part thereof.

Upon appeal, the Supreme Court of Idaho sustained the trial court on all matters involving the right of the defendants in error to the title and immediate possession of the property, but modified the decision of the court below in respect to some phases of the case involving purely State law and procedure. The decision of the Supreme Court of Idaho (R., 473-486) fully sustains the findings of fact and

conclusions of law of the trial court on the Federal questions involved in the cross-complaint of plaintiffs in error.

The syllabus of the decision of the Supreme Court of Idaho, as prepared by the court in this case, reads in part as follows (R., 474), to wit:

"7. Where the Secretary of the Interior under a contest proceeding between W. (White) and the Probate Judge on behalf of townsite claimants, has found as a fact that W.'s claim to the land in controversy was prior to that of the townsite claimants', this court would not be justified in holding that W. held the title thereto procured from the Government as trustee for the townsite claimants."

"10. In this matter, *the Secretary of the Interior* has found *as a fact* that W.'s claim to said land *was prior* to that of the townsite claimants' and for that reason this court would not be justified in holding that W. held said legal title as trustee for the townsite claimants." (Italics supplied.)

The errors assigned by plaintiffs in error are (R., 489-490) as follows:

Assignment of Errors.

"1. Under section 2387 of the Revised Statutes of the United States relating to the sale and disposition of public lands, lands settled upon and occupied as a townsite, the lands in controversy in this action were not subject to entry under the agricultural pre-emption or homestead laws of the United States; and under the undisputed facts in evidence before the Land Department of the United States in the contest before said Land Department wherein Henry Melder, the probate judge of Kootenai county, Idaho, was contestant, and John E. White was contestee, the land in controversy in this suit was settled upon and occupied as a townsite long before any attempted settlement thereon by said White; and thereafter the decision of the Land Department being the decision of the Honorable Secretary of the Interior mentioned in the answer and cross-complaint of the plaintiffs in error (defendants below) and set up in the answer of the defendants in error (plaintiffs below) to said cross-com-

plaint dismissing the contest of the probate judge and awarding the land to White, was contrary to law and an erroneous construction of the law as applied to the undisputed facts, and the Supreme Court of Idaho erred in not holding said patent to be void.

"2. Said Supreme Court of Idaho erred in not holding that under the statutes of the United States and under the undisputed facts in the case the homestead entry of John E. White should have been canceled and the probate judge allowed to enter the land in controversy in trust for the several uses and benefits of the townsite occupants.

"3. Said Supreme Court of Idaho also erred in not holding that the title to the land in controversy acquired by said John E. White by the patent issued to him should in justice and equity and according to law belong to the townsite occupants.

"4. The said Supreme Court of Idaho also erred in not holding and adjudging the title so acquired by said White to be held by him in trust for said townsite occupants.

"5. The said Supreme Court of Idaho also erred in holding that the *finding of the officers of the Land Department that White's claim and right was prior to that of the townsite claimants precluded the court from a consideration of that question. Such finding of the Land Department was contrary to all of the evidence before the Land Department.* The undisputed facts in the case show that the land was settled upon and occupied as a townsite long before White's settlement, and that when White settled he marked out his claim on the south side of the Northern Pacific right of way east of the county road, taking in none of the improvements of the townsite claimants, and he could not, after the land was surveyed, change his boundaries so as to take in the improvements of the townsite claimants.

"6. The said Supreme Court of Idaho erred in affirming that part of the judgment of the tiral court which adjudged and decreed that the defendants in error were entitled to the immediate possession of the land in controversy and for all costs necessarily incurred in establishing the defendants in error's action of ejectment.

"7. Said Supreme Court of Idaho also erred in remanding the case to the trial court with instructions and directions to enter an amended and modified judgment in favor of the

defendants in error (plaintiffs below) for the possession and restitution of the premiess in controversy.

"8. The said Supreme Court of Idaho erred in not reversing the judgment of the trial court and not giving to the plaintiffs in error their rights under the statutes and laws of the United States as townsite occupants on the public lands of the United States."

ARGUMENT.

I.

Decision of State Court Binding on Non-Federal Questions.

The sixth, seventh, and eighth assignments of error are more or less general in character, and the sixth and seventh assignments relate more to non-Federal than to any Federal question which may be involved; and the eighth assignment is too general, so far as it may relate to any Federal question, to require discussion.

To eliminate in the outset any non-Federal question from the case, it would only be necessary to call specific attention to the fact that the case is presented on writ of error to the supreme court of a State.

Rose's Codes of Federal Procedure, § 4 (*d*), § 12 (*h*), and § 2084, contains statements of the law relative to the scope of review on error to the State courts. Paragraph 2084 states the law as follows:

"It has long been settled law that the Supreme Court will only review such Federal question as has been properly raised and decided in the State court. The latter's decision on all other matters, both of law and fact, will be accepted by the Supreme Court as conclusive upon it."

Again, paragraph 12 (*h*) contains the following summary:

"On error from the Supreme Court to the highest State court the sole question is whether the latter's proceeding in a

cause have denied any Federal right. All other questions are concluded by the State court's decision. The question is not the correctness of the State court's interpretation and administration of its local jurisprudence, but whether, as administered, any Federal right is infringed. Hence the soundness of the State court's interpretation of its law is assumed. If the question is as to the validity of a State law under the Federal Constitution, the construction placed thereon by the State court is binding and the question is, Does the law as so construed violate Federal limitations? If the State court holds a portion of a law void, but declares the rest severable and enforceable, this conclusion binds the Supreme Court. If the State court declares that two provisions of a law must read together, this is binding on the Supreme Court. If the construction of the State court renders the State law constitutional, the Supreme Court will follow it; and if it renders it unconstitutional, it is binding, although the construction seems unwarranted, and the law must be declared invalid. On error to a State court the Supreme Court must accept the State court's decision that a law or ordinance is valid under the State constitution."

The cases collected by this author abundantly bear out his statements.

Almost any one of the several cases cited contains a clear and emphatic statement by this court that it will not go into non-Federal questions of law on writ of error to a State court. As illustrative of these cases, the following cases are in point:

In Palmer *v.* McMahon, 133 U. S., 660, 665, this court says:

"We are bound by the decision of the Court of Appeals of the State of New York adversely to the plaintiff in error as to failure to comply with the said statute in relation to the method of procedure, form of assessment, oath of assessors, etc."

In Turner *v.* Board of Commissioners, etc., 173 U. S. 661, 463, a suit on a bond, the Supreme Court refused to go into the decision of the court below as to the validity of the

bond, even though that decision was contrary to some of the earlier decisions of the same court. The court says:

"We have no power to examine the correctness of the decision of the Supreme Court of North Carolina, because, this being a writ of error to a State court, we cannot take jurisdiction under the allegation that a contract has been impaired by a decision of that court, when it appears that the State court has done nothing more than construe its own constitution and statutes existing at the time when the bonds were issued, there being no subsequent legislation touching the subject. We are therefore bound by the decision of the State court in regard to the meaning of the constitution and laws of its own State and its decision upon such a state of facts raises no Federal question."

This court in this case, in quoting from an earlier decision, makes the distinction between writs of error to a lower court of the United States and the highest court of a State. In the former case, according to the distinction here made, this court will consider all questions of law on their merits and, in the latter case, will confine its attention exclusively to questions which are Federal in their nature.

In Tullis *v.* Lake, etc., R. R., 175 U. S., 348, 353, the question related to the constitutionality of a statute making a defendant railroad company liable for the negligence of a fellow-servant. This court refused to go into the interpretation of the State statute by the State court, but accepted, without question, the State court's interpretation and gave its decision on that construction of the statute.

The court, in quoting from another decision, says:

"The elementary rule is that this court accepts the interpretation of a statute of a State affixed to it by the court of last resort thereof."

In Baltimore T. Co. *v.* Baltimore, etc., R. R. Co., 151 U. S., 137, 138, this court, in a condemnation suit, where the question was one of due process of law, says:

"We are bound to accept the conclusions of the State court as to the proper construction of the statute and render its decision on that basis."

In Chesapeake, etc., Ry. *v.* Kentucky, 179 U. S., 388, 395, this court accepted, without question, the decision of the lower court that the statute requiring separate coaches for white and colored passengers applied only to travel terminating and ending within the State. The court says, with reference to the decision of the court below:

"And if we were in doubt on that point, we should unhesitatingly refer to the opinion of the court of appeals."

In Wabash, etc., R. R. *v.* Illinois, 118 U. S., 557, 565, the State court had held that an Illinois statute making it illegal for a railroad company to accept more for a longer than a short haul applied even where the shipments were to points outside the State. This court accepted that interpretation of the statute, and on that interpretation declared the statute unconstitutional. The court says:

"We are bound in this court to accept that construction."

In Morley *v.* Lake, etc., Ry., 146 U. S., 162, 166, it appears that the New York legislature had passed a statute changing the rate of interest from seven to six per cent, with the proviso that the change should not affect any existing contracts. The New York court held that, under the statute, interest on an existing judgment should be reduced. On writ of error this court held that it must accept, without question, the decision of the State court as to the proper construction of the statute and render its decision on that basis.

These cases, together with others which might be cited, seem to establish beyond a doubt that this court will not, on writ of error to a Supreme Court of a State, go into questions decided by the State court below, which are of a non-Federal character. We have found no opinion or statement which questions this practice.

II.

Findings of Fact by Land Department and Courts Below Conclusive.

The only Federal questions involved in this case are predicated upon questions of fact which, it will be contended, were decided adverse to the contentions of the plaintiffs in error, both by the Secretary of the Interior, before the issuance of the patent to the defendants in error, and by the trial and Supreme Court of Idaho in this case.

It is, therefore, not inappropriate, before entering into a more detailed discussion of the assignment of errors purporting to raise Federal questions, to consider the effect given by this court to findings of fact:

(A) By the Land Department of the United States, and

(B) By the Supreme Court of a State.

Considering these two phases of the subject in inverse order, the proposition will first be presented that this court is bound by the findings of fact by the Supreme Court of Idaho not inconsistent with the findings of fact by the Land Department.

Findings of Fact by Courts Below Conclusive.

The following provisions of the Revised Statute of the United States are pertinent:

"Section 649. Issues of fact in civil cases in any circuit court may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury."

"Section 700. When an issue of fact in any civil cause in a circuit court is tried and determined by the court without the intervention of a jury, according to section six hundred

and forty-nine, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment."

"SECTION 709. The final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn any question of validity, etc. (enumerating the instances of review) may be examined and reversed or affirmed in the Supreme Court upon a writ of error. *The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States.*" (Italics supplied.)

The above provisions of the statute make no distinction between review of equity cases and cases at law, and provide for the same procedure in a review from the State court as in a review from the lower Federal courts.

The authorities establish beyond question that in a writ of error to the circuit court, at least in an action at law, the higher court will not go into questions of fact found by the court below.

In Saulet *v.* Shepperd, 4 Wall., 502, on a writ of error to the circuit court in an action relating to the title of certain land, this court held:

"The statement of the evidence made by the court below is in the nature of a special verdict and conclusive as to the facts of the case. The one question for our consideration is whether the judgment of the court thereon is erroneous."

In Copelin *v.* Insurance Company, 9 Wall., 461, 467, on writ of error to the circuit court in a suit on an insurance policy, this court says:

"We cannot follow the plaintiffs in error into an examination of the evidence, in order to inquire whether it was not the fault of the assured that the boat was not repaired and tendered to him in a reasonable time. Our judgment is necessarily founded exclusively upon the finding of the facts by the court."

In Insurance Company *v.* Folsom, 18 Wall., 237, 249, also on error to the circuit court in a suit on an insurance policy, this court says (page 249):

"Propositions of fact found by the court in a case where the trial by jury is waived, as provided in the act of Congress, are equivalent to a special verdict and the Supreme Court will not examine the evidence on which the finding is found."

In United States *v.* Dawson, 101 U. S., 569, a suit by the United States, brought in the circuit court on a bond of a revenue collector, where the question was whether the balance due was for uncollected taxes or for money actually collected, the lower court found in favor of the former contention. This court, on writ of error, said:

"Counsel for the Government argued against this conclusion, but whether sound or not, it was a question of fact on which the finding of that court cannot be reversed here, and its judgment is accordingly affirmed."

In Tyng *v.* Grinnell, collector, 92 U. S., 467, also a suit against a revenue collector, where the question was whether the articles in question were flues or wrought iron tubes within the terms of the revenue law, the findings of fact in the court below were recognized as binding in this court.

In Quinby *v.* Conlan, 104 U. S., 420, page 425, it was held that this court will not review questions of fact determined by the land officers:

"Courts cannot exercise any appellate jurisdiction over the ruling of these officers or of their superiors in the department in such matters, nor can they reverse or correct them in a collateral proceeding between private parties."

WRITS OF ERROR TO STATE COURTS.

The same proceeding prevails in actions at law on a writ of error to the State courts.

In A. T. & S. F. R. R. Co. *v.* Matthews, 174 U. S., 96, this court, in passing upon the constitutionality of a statute providing for a reasonable attorney's fee in a judgment against a railroad company for damages from fire, said:

"All questions of fact are settled by the decision of the State court."

In re Buchanan, petitioner, 158 U. S., 31, on a motion for a new trial on the ground of incapacity of one of the jurors, and on writ of error to the State court from the Federal court because of an alleged denial of the right of trial by jury, this court held that the determination by the lower court of the qualifications of the juror was one of fact, and that—

"this court upon a writ of error to the highest court of the State, in an action at law, cannot review its judgment upon such a question."

In C., B. & Q. R. R. Co. *v.* Chicago, 166 U. S., 226, the city of Chicago sought to condemn for street purposes part of a right of way of a defendant railroad company, and the jury fixed the damages at one dollar. The judgment was affirmed by the State court and a writ of error obtained. This court held, first, that under amendment 7 of the Federal Constitution the Supreme Court of the United States could not question a verdict of a jury; second, Congress had not given the Supreme Court power to review questions of fact found by the court below, and said:

"To this it may be added that Congress has provided that the final judgment of the highest court of a State in cases of which this court may take cognizance, shall be re-examined upon writ of error, a process of common-law origin which removes nothing but questions of law arising upon the record."

In Lewis *v.* Campau, 3 Wall., 106, a decision of the State court as to the value of land conveyed by deed, upon which depended the requisite amount of stamps under the revenue law of the United States, was held not to be reviewable, although if the value of the land had been admitted a Federal question would have been presented.

In Martin *v.* Marks, 97 U. S., 345, 348, upon a writ of error to the Supreme Court of Louisiana in an action in the nature of ejectment, the court said that the question whether the selection of swamp lands had in fact been filed by the surveyor general in the general land office was "not of that Federal character which authorizes us to review the decision of the Supreme Court of Louisiana upon it."

EQUITY CASES.

Also, in equity cases on writ of error to the Supreme Court, the prevailing practice of the higher court of the United States seems to be for that court to refuse to go into questions of fact.

In Dowe *v.* Richards, 157 U. S., 658, there was an action of ejectment, brought first in the State court of California, for the recovery of two lots. Plaintiffs claimed through a town-site patent and defendants based their claim on a mining location. The determining question was whether at the time the patent was given the property in question was known to be mineral land. The State court determined that the patentees did not have this knowledge and decided in favor of the town-site claimants. A writ of error was obtained to the Supreme Court on the ground that the decision of the Supreme Court of California "in matter of fact was erroneous and contrary to the weight of the evidence in the case." Concerning ....s, this court said:

"But to review the decision of the State court upon the question of fact, is not within the jurisdiction of this court."

This case did not involve an equity question, but the court went at length into the question of review of questions of fact on writ of error from the Federal court. The question of review in equity cases was left open by the court (page 457), but the language and reasoning of the decision is plainly against such practice. The gist of the reasoning in this respect is found in the two following quotations. The court, in quoting, with approval from Mr. Justice Wayne, said:

"No opinion has been more repeatedly and authoritatively settled than that this court will not upon a writ of error revise or give judgment as to the facts, but takes them as found by the court below, and as they are exhibited by the record."

This court then said:

"The only appellate jurisdiction which has ever been conferred by Congress upon this court to review the judgments or decrees, at law or in equity, of the highest court of a State, has been by writ of error."

In Hedrick *v.* A., T. & S. F. R. R. Co., 167 U. S., 673, the plaintiff, who held a patent on the lands in question, brought an action in ejectment. The defendants set up in their answer the allegations of their equitable title to the effect that the plaintiff was not an innocent purchaser for value. The lower court of the State of Missouri, and also the Supreme Court of that State, determined the facts in favor of the defendant. A writ of error from the Supreme Court to the State court was obtained. Held:

"The findings of fact by the trial court and by the Supreme Court of the State are in this writ of error conclusive upon us."

Egan *v.* Hunt, 165 U. S., 188, in a suit to enjoin the building, by the board of State engineers of Louisiana, of a dam across an alleged stream, the State court denied the plaintiff's application for an injunction, and determined the facts

in favor of the defendant. On writ of error from the Federal court, that court declined to go into the decision of the State court upon the questions of fact, and dismissed the writ. The following is the language of the court, which is clear and conclusive:

"The record before us contains all the testimony introduced and evidence offered in the trial court, all of which was open for consideration and passed upon by the Supreme Court of the State of Louisiana. On error, however, to a State court, this court cannot re-examine the evidence, and, when the facts are found below, is concluded by such finding (Dower *v.* Richards, 151 U. S., 658; 14 S. C. R., 452; Bartlett *v.* Lockwood, 160 U. S., 386; 16 S. C. R., 334; Stanley *v.* Schwalby, 162 U. S., 255; 16 S. C. R., 754). True it is that in Dower *v.* Richards, the court (referring to the dictum in Republican River Bridge Co. *v.* Kansas Pac. Ry., 92 U. S., 315, 317) treated as open for further consideration the question whether, in chancery cases, the power existed in this court to review the decision of State courts on both the law and the fact. We, however, conclude that not only the very nature of a writ of error, but also the rulings of this court from the beginning, make it clear that *on error to a State court in a chancery case, as in a case at law, when the facts are found by the court below, this court is concluded by such findings.* The adjudications are collected very fully in Dower *v.* Richards, and in the subsequent cases above referred to." (Italics supplied.)

"Now, the foregoing findings, by the trial court, approved and affirmed by the Supreme Court of Louisiana (that is, the nonnavigability of the stream, and the concurrent participation of the United States and the State in the building of the dam), are purely questions of fact, and therefore, as we have said, are conclusive."

The same principle has been followed in all of the later cases in this court which have come to the knowledge of counsel, including the cases of

E. Building and Loan Association *v.* Ebaugh, 185 U. S., 114, 122.

Adams *v.* Church, 193 U. S., 510, 513.

The above authorities establish beyond question that this court will not, on a writ of error, either to a Federal court or to a State court in a law case, review questions of fact found by the court below. Further, the same principle has been extended to and is followed in respect to writs of error to the Supreme Court of any State in an Equity cause, as to which the same statutes apply, and this court has held repeatedly that the same principle is involved, as shown by the decisions referred to above.

FINDINGS OF FACT AND MIXED QUESTIONS OF FACT AND LAW BY THE LAND DEPARTMENT CONCLUSIVE ON THE COURTS.

All questions of fact and all questions of mixed law and facts involved, or which might have been presented in a contest in the Interior Department and determined, either expressly in finding of fact or by the issuance of the patent, are conclusive upon the courts, in the absence of fraud practiced upon the complaining party or upon the Land Office, or fraud in which the officers of the Interior Department participated.

De Cambra *v.* Rogers, 189 U. S., 119, 122.
Palter *v.* Hall, 189 U. S., 292.
Burfenning *v.* Chicago, St. P., M. & O. R. R. Co., 163 U. S., 321, 323.
Stewart *v.* McHarry, 159 U. S., 643.
Stanford *v.* Stanford, 139 U. S., 647.
Lee *v.* Johnson, 116 U. S., 48.
Baldwin *v.* Stark, 107 U. S., 463.
Steel *v.* Smelting Co., 106 U. S., 451.
Quinby *v.* Conlan, 104 U. S., 420, 423, 425, 426.
United States *v.* Atherton, 102 U. S., 372, 374.
Marquez *v.* Frisbie, 101 U. S., 476-8.
Vance *v.* Burbank, 101 U. S., 514, 519, 520.
United States *v.* Throckmorton, 98 U. S., 61, 65, 66, 69.
French *v.* Flynn, 93 U. S., 171-2.
Shipley *v.* Cowan, 91 U. S., 330, 339, 340.

As preliminary to a discussion of these cases, it is deemed proper to call attention to the fact that, independently of the question as to whether or not fraud was sufficiently charged in the cross-complaint, any possible question of that character is eliminated by the specific findings of fact by the trial court, in effect, affirmed by the Supreme Court of Idaho, which findings are numbered 28 and 29 and read as follows (R., 59), to wit:

"*That the officers of the Interior Department did not exclude any testimony, and there was in said Land Office and said Department a full, fair and complete hearing.*

"*That the officers of said Interior Department of said Land Office or any or either of them were not guilty of any fraud or any unlawful conduct.*"

The trial court, in its finding of fact numbered 26 (R., 59), incorporated as a part thereof the decisions of the Interior Department, dated May 22, 1899 (R., 34-45), and May 1, 1903 (R., 45-49), by which latter decision (R., 49) the Department referred to the charges of fraud preferred against John E. White, defendant in error, and, in respect thereto, made the following findings of fact, to wit:

"*While an attempt was made to prove these charges, the result was a failure.* Two or three witnesses testified to conversations alleged to have been had with White whereby they were induced to build upon and improve some portion of the lands in controversy but the preponderance of the testimony tends to disprove said claim and shows that White *repeatedly notified parties*, in some cases in writing, and in others verbally, *not to build upon said land as he claimed the same under his homestead entry.*

"The Department is of opinion from an examination of the testimony taken at both hearings, *that White's entry was made in good faith.*" (Italics supplied.)

Having thus disposed of any possible question of there having been any fraud, either on the part of the entryman or any officer of the Land Department, by the specific find-

ings of fact by the trial court, in effect, affirmed by the Supreme Court of the State of Idaho, and, therefore, not reviewable by this court, it is deemed not inappropriate to submit extracts from a few of the citations above to the effect that the findings of fact and all questions of mixed law and fact by the Land Department is conclusive upon the courts.

In the case of De Cambra *v.* Rogers (*supra*), there was involved a cross-complaint of a contestant before the Land Department to an action in ejectment brought against him by the patentee of the United States, the successful party to the contest before the Land Department. The cross-complaint, as in the case at bar, sought a decree declaring the holder of the legal title his trustee, and averred—

"that the land officers came to their conclusion 'by the misconstruction of the evidence and in violation of the just and equitable rights and claims of Manuel S. De Cambria.'"

the cross-complainant.

Mr. Justice Brewer, in rendering the decision of this court, said:

"As it appears affirmatively that, before the contest, De Cambra was informed of the nature of the wrongs he alleges were perpetrated upon him by Rogers, it may be presumed that evidence was offered by both parties upon that question, and that it was decided adversely to his contention. Under those circumstances nothing is shown except an ordinary contest between two applicants for preemption, in which the land officers upon the testimony decided in favor of one of them and against the other. But it is well settled that the decision of the Land Department upon questions of fact is conclusive in the courts.

"It is hardly necessary to say that when a decision has been made by the Secretary of the Interior, courts will not entertain an inquiry as to the extent of his investigation and knowledge of the points decided, or as to the methods by which he reached his determination."

In the case of Palter *v.* Hall (*supra*) there was involved an appeal on the part of a patentee of the United States from the Supreme Court of the Territory of Oklahoma, holding that the final decision of the Secretary of the Interior to the effect that the entryman was not disqualified by having visited land thrown open for entry under the act of March 2, 1889, and the proclamation of the President issued pursuant thereto, prior to the day specified for the opening, on the ground that the findings by the Secretary of the Interior constituted an error of law. This court, in delivering the opinion, through Mr. Justice White, reversed the decision of the Supreme Court of the Territory, for reasons appearing in the syllabus, namely:

"The ruling of the Land Department in this particular case that the prior going into the prohibited territory by an entryman who had retired and taken part in the race on an equality with others did not disqualify the entryman, because the prior entry had given him no particular advantage which he would not otherwise have possessed, Held, *to be a finding of fact not reviewable by the court.*" (Italics supplied.)

In the case of Burfenning *v.* Ch., St. P., M. and O. Ry. Co., *supra*, Mr. Justice Brewer, in delivering the opinion of this court, said:

"It has undoubtedly been affirmed over and over again that in the administration of the public land system of the United States questions of fact are for the consideration and judgment of the Land Department, and that its judgment thereon is final. Whether, for instance, a certain tract is swamp land or not, saline land or not, mineral land or not, presents a question of fact not resting on record, dependent on oral testimony; and it cannot be doubted that *the decision of the Land Department, one way or the other, in reference to these questions is conclusive*, and not open to relitigation in the courts," etc. (Italics supplied.)

In Marquez *v.* Frisbie (*supra*) this court held:

"That principle is that, the decisions of the officers of the Land Department, made within the scope of their authority,

on questions of this kind, is in general, conclusive everywhere, except when considered by way of appeal within that Department; and that as to the facts on which their decision is based, in the absence of fraud or mistake, that decision is conclusive even in courts of justice, when the title afterwards comes in question."

Further on in the decision, in discussing the jurisdiction of courts of equity to relieve against errors of law apparent from findings of fact, this court, in this case, said:

"Let us inquire first into the alleged mistake of law by the Land Department.

"The language of this court in Moore *v.* Robbins (96 U. S., 535), cited above, is that equity will interfere '*when it is clear* that these officers have, by a mistake of the law, given to one man the land which, on the undisputed facts, belong to another.'

"*This means, and it is a sound principle, that where there is a mixed question of law and of fact, and the court cannot so separate it as to see clearly where the mistake of law is, the decision of the tribunal to which the law has confided the matter is conclusive.*"

In the case of Quinby *v.* Conlan (*supra*), the court held:

"But independently of this conclusion there is a general answer to the alleged erroneous rulings of the officers of the Land Department as grounds for the interference of the court. Those rulings were upon mere matters of fact, *or upon mixed questions of law and fact*, which were properly cognizable and determinable by the officers of that department.

"The laws of the United States prescribe with particularity the manner in which portions of the public domain may be acquired by settlers. They require personal settlement upon the lands desired and their inhabitation and improvement, and a declaration of the settler's acts and purposes to be made in the proper office of the district, within a limited time after the public surveys have been extended over the lands. By them a land department has been created to supervise all the various steps required for the acquisition of the title of the Government. Its officers are required to receive, consider, and pass upon the proofs furnished as to the alleged settle-

ments upon the lands and their improvement, when pre-emption rights are claimed, and, in case of conflicting claims to the same tract, to hear the contesting parties. The proofs offered in compliance with the law are to be presented, in the first instance, to the officers of the district where the land is situated, and from their decision an appeal lies to the commissioner of the general land office, and from him to the Secretary of the Interior. For mere errors of judgment as to the weight of evidence on these subjects by any of the subordinate officers, the only remedy is by an appeal to his superior of the department. The courts cannot exercise any direct appellate jurisdiction over the rulings of those officers or of their superior in the Department in such matters, nor can they reverse or correct them in a collateral proceeding between private parties.

"In this case the allegation that false and fraudulent representations, as to the settlement of the plaintiff, were made to the officers of the Land Department is negatived by the finding of the court. It would lead to endless litigation, and be fruitful of evil, if a supervisory power were vested in the courts over the action of the numerous officers of the Land Department, on mere questions of fact presented for their determination. It is only when those officers have misconstrued the law applicable to the case, as established before the Department, and thus have denied to parties rights which, upon a correct construction, would have been conceded to them, or where misrepresentations and fraud have been practiced, necessarily affecting their judgment, that the courts can, in a proper proceeding, interfere and refuse to give effect to their action. On this subject we have repeatedly and with emphasis expressed our opinion, *and the matter should be deemed settled* (Johnson *v.* Towsley, 13 Wall., 72; Shepley *v.* Cowan, 91 U. S., 330, 340; Moore *v.* Robbins, 96 *Id.*, 530).

"And we may also add, in this connection, that *the misconstruction of the law by the officers of the Department, which will authorize the interference of the court, must be clearly manifest*, and *not alleged upon a possible finding of the facts from the evidence different from that reached by them.* And where fraud and misrepresentations are relied upon as grounds of interference by the court, they should be stated with *such fullness and particularity as to show that they must necessarily have affected the action of the officers of the*

Department. Mere general allegations of fraud and misrepresentations will not suffice. United States *v.* Atherton, 102 U. S., 372." (Italics supplied.)

The only semblance of fraud charged in the case at bar on the part of the land officers was to the effect that certain evidence was excluded by the register and receiver during the first hearing before them. As has been shown, the courts below have affirmatively found as a fact that there was no fraud, and that there was a full, fair, and complete hearing before the Land Department. In the light of the authorities cited, it can be readily seen that any possible failure on the part of the register and receiver to consider any testimony adduced, if erroneous, could have been corrected upon appeal. In fact any act of the local officers purporting to exclude consideration of evidence is cured and corrected by the rule of practice of the Land Department, set forth in the answer of defendants in error to the cross-complaint. That rule required the evidence to be received and transmitted to the higher officers (R., 33). The courts take judicial notice of this rule.

Cohn *v.* U. S., 152 U. S., 211.
Whitney *v.* Spratt, 25 Wash., 65.

The records of the Interior Department showed that this rule was complied with, and that the plaintiffs in error had the advantage on appeal of all evidence offered by them

It is not permissible to introduce evidence in the courts upon any question that was raised or could have been raised in the Interior Department.

Vance *v.* Burnamk, 101 U. S., 520.
Lee *v.* Johnson, 116 U. S., 48.
U. S. *v.* N. P. R. R. Co., 95 Fed., 864.
Wiseman *v.* Eastman, 21 Wash., 163.
De Cambra *v.* Rogers, 189 U. S., 119.
Smelting Co. *v.* Kemp, 104 U. S., 641.

Thus it is demonstrated that the findings of fact and all mixed questions of fact and law, as found by the Land Department are conclusive upon the court. Furthermore, that this court, on writ of error to the Supreme Court of Idaho, will not review the findings of fact by the courts below, but will only consider questions of law, if any, which may be clearly presented upon *unmixed* findings of fact by the Land Department and the courts below.

III.

Prior Settlement.

In the light of the foregoing authorities, it is clear that this court is bound by the findings of fact by the Land Department and the courts below to the effect that John E. White, defendant in error, was a *bona fide* homestead settler, who initiated his settlement on the legal subdivision in question in 1891, established his residence thereon in February, 1892, and thereafter complied with the homestead laws of the United States in every particular, including the submission of the proper entry papers and final proof, on which patent was issued. Also that when he made his settlement, established his residence, and when the Government survey was made of the township, in which the land is situated, there was no townsite occupancy on the legal subdivision in question or any part thereof. Also that "after the survey in the field (in 1893) White made claim to the entire tract, and exercised the right of ownership over the same" (R., 44), including that part of the legal subdivision not originally occupied by him.

It is submitted that what constitutes a townsite occupation is a question of fact, and that the finding of the Land Department in this regard is conclusive. But, even if the question of the existence or non-existence of a townsite should be held to be a mixed question of fact and law, the finding

of the Land Department in this regard would be none the less binding upon this court.

It must, therefore, be recognized as a settled fact in this case that when John E. White made his settlement and established his residence, and even when the Government survey was made in 1893, there was no townsite on the legal subdivision in question.

Effect of Settlement.

The settlement, occupancy, and assertion of claim, as found by the Land Department, by the defendants in error upon unsurveyed lands of the United States *cut off all claims* subsequent to the date of such *settlement*.

Vol. 1, Supp. to U. S. R. S., pp. 282-3.
Sturr *v.* Beck, 133 U. S., 541.
N. P. R. R. Co. *v.* Smith, 171 U. S., 260.
Nelson *v.* N. P. Ry. Co., 188 U. S., 108.
Baker *et al. v.* Biggs, 15 L. D., 41.
Melder *v.* White, 28 L. D., 412.
John T. Wright, 32 L. D., 525.

The record shows that the settlement and residence of the defendants in error was first made on unsurveyed lands of the United States, and that the residence was located and all of the buildings and improvements of that character were situated upon the particular forty-acre tract, which was subsequently, to wit, October 29, 1905, first claimed on behalf of ten certain petitioners to the probate judge for a townsite. The exterior boundaries of this legal subdivision were not known until the Government survey was run in the field in the summer of 1893, and the claim is being made by the plaintiffs in error that the defendants in error should only have taken through their homestead entry and patent the particular part of the legal subdivision which was in their possession prior to the time at which the Government survey

was made. In this connection the laws of the United States and the construction thereof by the courts and by the Department of the Interior are diametrically opposed to the contention of plaintiffs in error.

The settlement of the defendants in error authorized the claim and entry for the *whole quarter section* embraced within their homestead entry, and necessarily included the whole of the particular legal subdivision on which their improvements were made and their residence was maintained.

The rule is stated in the case of Quinby *v.* Conlan, 104 U. S., 423, as follows:

"A settlement upon a portion of a quarter section, and making the improvements required by law, will sustain a pre-emptive claim to the whole quarter section as against subsequent settlers."

. No entry could have been made by defendant in error John E. White for anything less than a legal subdivision conformable to the Government survey.

U. S. R. S., sec. 2289, as amended in 1891, vol. 1, Sup. to U. S. R. S., p. 942.
Warren *v.* Van Brunt, 19 Wall., 652.
Coyne *v.* Townsite of Crook *et al.*, 6 L. D., 675.
Woodruff Townsite, 15 L. D., 205.
Payne Townsite *v.* Mick *et al.*, 18 L. D., 223.
Instructions, 32 L. D., 239.
John T. Wright, 32 L. D., 524.

The statute provides that entries must be in conformity to the legal subdivision of the public lands.

In the case of Warren *v.* Van Brunt (*supra*), this court held:

"There is no legal subdivision of the public lands less than a quarter of a quarter section, or 40 acres, except in the case of fractional sections. The lands in controversy, therefore, could not have been subdivided for the purposes of entry and purchase. The 40 acres must be taken as a whole or not at all."

It is conceded in the answer and cross-complaint that defendants in error settled upon and are entitled to that portion of the N. W. ¼ of the S. W. ¼ of said section that lies south of the railroad right of way and east of the county road, about one-fourth of the forty acres. This concession entitles defendants in error to hold the whole forty acres under the rule established by the cases of Quinby *v.* Conlan and Warren *v.* Van Brunt (*supra*).

If this be not true the entry of defendant in error John E. White would have failed completely, because he could not maintain his entry by a settlement and occupancy of a fraction of the forty acres under the rule in Warren *v.* Van Brunt, *supra*, and it is doubtful whether he could have sustained his entry as to the lots because he never had thereon a dwelling-house.

Ferguson *v.* McLaughlin, 96 U. S., 175.

There is no authority for dividing a legal subdivision between a homesteader and townsite claimants, except by mutual consent of all interested parties.

U. S. R. S., Sec. 2274.
Dunegan *et al. vs.* Spark, 32 L. D., 313-4.
Harding *v.* Moss, 24 L. D., 160.
Irwin *v.* Nemson, 24 L. D., 189.
Hall *v.* Mitchell, 24 L. D., 584.
Sumner *v.* Roberts, 23 L. D., 201.
Hopkins *v.* Wagner *et al.*, 23 L. D., 400.

Section 2289 of the Revised Statutes, as amended on March 31, 1891, is in part as follows:

"Every person who is the head of a family or who has arrived at the age of 21 years, and is a citizen of the United States, or who has filed his declaration of intention to become such as required by the Naturalization Laws, shall be entitled to enter one-quarter section, or a less quantity, of unappropriated public land, to be located in a body *in conformity to the legal subdivision of the public lands.*" (Italics supplied.)

It is thus clear that the course pursued by the homestead atentee in embracing in his entry the whole of the legal ıbdivision on which his settlement and residence was made, as in conformity with the statute of the United States and ıe construction thereof both by the Department of the In-erior and this court.

Counsel for plaintiffs in error made some point in the ourt below and, presumably, will do so here in respect to ıe ruling of the Register and Receiver to the effect that a ertain document offered in evidence by townsite claimants as irrelevant. In view of the law, they were undoubtedly orrect in this regard. But the rules of practice of the Land Department permitted the filing of the document so that the ame might be considered on appeal to the Secretary of the nterior. This document was duly considered upon appeal nd was regularly passed upon by the Secretary of the In-erior, as is shown by his decision of May 22, 1899 (R., 4). The language of the Secretary on this particular sub-ect is as follows:

"The evidence shows that after the survey in the field *White made claim to the entire tract and exercised the rights f ownership over the same.* It was necessary for him to djust his settlement claim to the lines of the public survey, nd in so doing to include the legal subdivision on which is improvements were placed.

"It also appears that on November 18, 1890, White filed n the office of the County Recorder of Kootenai County, daho, a notice of a 'possessory right,' to the land south of ıe railroad right of way, and it is urged that he is estopped rom now claiming any part of the tract north of the rail-oad right of way, because it was not included in said notice. The notice was filed under a territorial act, approved De-ember 10, 1864, afterwards embodied in sections 4552, 556 of the Revised Statutes of Idaho, for 1887, relating to Possessory Actions for Public Lands,' and providing that

"'Any person * * * occupying and settled upon, ny of the public lands of the United States in this Terri-ory, for the purpose of cultivating or grazing the same, may

commence and maintain any action for interference with or injury to, his possession of such lands against any person interfering with or injuring the same.'

"It is further provided therein that the claimant shall file in the County Recorder's office an accurate description of his possessory claim.

"White's notice concluded with the statement: 'I make this location under the laws of the Territory of Idaho, pursuant to an act entitled an act prescribing the mode of maintaining and defending possessory actions on the public lands in the Territory of Idaho, approved December 10, 1864.' The purpose of this notice, as will be seen, was not to define any claim White might assert under the Federal laws, but to enable him to protect, under the local laws, any invasion of his possessory claim. Aside, however, from a special purpose which the notice was intended to subserve, it cannot be held that a notice of a possessory claim, given prior to survey in the field, will estop the settler from afterwards making his entry conform to the legal subdivision in such manner as to include the land actually settled upon by him, *as against settlers whose rights were acquired after such survey.*" (Italics supplied.)

The respective rights of the plaintiffs in error and defendants in error must be determined by Federal laws.

Wilcox *v.* McConnell, 13 Peters, 498.
Irvine *v.* Marshall, 20 Howard, 558, 563-4.
Gibson *v.* Chouteau, 13 Wall., 92, 99, 100.
Camfield *v.* U. S., 167 U. S., 518, 526.
N. P. Ry. *v.* Townsend, 190 U. S., 267.

In the case of Gibson *v.* Chouteau, *supra*, this court held:

"As legislation of a State can only apply to persons and things over which the State has jurisdiction, the United States are also necessarily excluded from the operation of such statutes.

"With respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations. Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this prop-

erty, or any part of it, and to designate the persons to whom the transfer shall be made. No State legislation can interfere with this right or embarrass its exercise; and to prevent the possibility of any attempted interference with it, a provision has been usually inserted in the compacts by which new States have been admitted into the Union, that such interference with the primary disposal of the soil of the United States shall never be made. Such provision was inserted in the act admitting Missouri, and it is embodied in the present Constitution, with the further clause that the legislature shall also not interfere with any regulation that Congress may find necessary for securing the title in such soil to the *bona fide* purchasers.

"The same principle which forbids any State legislation interfering with a power of Congress to dispose of the public property of the United States, also forbids any legislation depriving the grantees of the United States of the possession and enjoyment of the property granted by reason of any delay in the transfer of the title after the initiation of proceedings for its acquisition. The consummation of the title is not a matter which the grantees can control, but one which rests entirely with the Government. With the legal title, when transferred, goes the right to possess and enjoy the land, and it would amount to a denial of the power of disposal in Congress if these benefits, which should follow upon the acquisition of that title, could be forfeited because they were not asserted before that title was issued."

It is clear, therefore, that the so-called possessory claim, filed by Mr. White in 1890, covering a part of the land embraced in his entry, was not only considered by the Secretary of the Interior in reaching his conclusion in the contest between Mr. White and the townsite claimants; but, for reasons stated in the opinion of the Secretary of the Interior and under the decisions of this court, the fact that Mr. White utilized the territorial statute in aiding him to retain possession pending the Government survey and Government disposition of the land, in no way embarrassed or rendered invalid the course pursued by him, after such Government survey, in making "claim to the entire tract" in controversy and exercising, "the rights of ownership over

the same;" and, later, when the land was thrown open to entry, in incorporating the whole of said tract in his homestead application and entry. The action of the Land Department in granting a patent for the land embraced within the entry was in every way lawful and proper.

The rights of Mr. White were initiated by settlement in 1891, and it is encumbent upon the plaintiffs in error to show that the land was reserved from homestead settlement at that time and that said reservation continued uninterruptedly, as a condition precedent to overcoming the force and effect of the law, which awards to the first *bona fide* settler the best right against the world, except the United States. The United States has recognized this right in the issuance to him of a patent, and the plaintiffs in error are bound by the findings of fact of the Land Department to the effect that the particular land in controversy was subject to the settlement of White at the time thereof, and that there was no prior appropriation of the land which reserved the same from the valid settlement, as made by the defendant in error.

IV.

It was not sufficient for cross-complainants, the plaintiffs in error, to show—which they have not done and cannot do—that the patentee ought not to have received the patent. It must affirmatively appear that, by the law, properly administered, the title should have been awarded to the plaintiffs in error by the Land Department.

Vehall *v.* Della, 114 U. S., 47.
Sparks *v.* Pierce, 115 U. S., 408.
Lee *v.* Johnson, 116 U. S., 48.

In the case of Vehall *v.* Della (*supra*), this court said:

"We do not think the claim of the defendant to the equitable relief he seeks can be sustained on the grounds stated in his answer or cross-complaint. To charge the holder of

the legal title to land under a patent of the United States, as a trustee of another, and to compel him to transfer the title, the claimant must present such a case as will show that he himself was entitled to the patent from the Government, and that in consequence of erroneous rulings of the officers of the Land Department upon the law applicable to the facts found, it was refused to him. It is not sufficient to show that there may have been error in adjudging the title to the patentee. It must appear that by the law properly administered the title should have been awarded to the complainant. Smelting Co. *v.* Kemp, 104 U. S., 636, 647; Boggs *v.* Merced Mining Co., 14 Cal., 279, 363. It is therefore immaterial for the decision of this case what our judgment may be upon the conclusions of those officers as to the possession of the patentee."

Before entering into a discussion of the question as to whether the townsite laws were sufficiently complied with in connection with the only proceedings ever had whereby any attempt was made to obtain a townsite entry, which proceedings, as found by the Secretary of the Interior (R., 38), were *begun* by petition of *ten* persons to the probate judge, dated *October 29, 1895*, it is deemed proper to first consider the status of the alleged townsite occupancy of the land in 1891, when the homestead patentee initiated his settlement, and February, 1892, when he established his residence on unsurveyed lands of the United States, under section 3 of the act of Congress approved May 14, 1880 (21 Stat., 140), and the summer of 1893, when the Government survey was made of the section.

The question in this case is as to whether or not the property was subject to settlement at the time of White's settlement thereon, or whether it was at that time a townsite and not subject to settlement; and, it is also incumbent upon the plaintiffs in error to show that there was thereafter no abandonment of any such alleged townsite claim. Both of these propositions involve questions of fact, which have been passed upon by the Land Department and the courts below adversely to the contentions of the plaintiffs in error,

and the findings of the Interior Department were conclusive on the courts below and are conclusive on this court.

Plaintiffs in error wish to discuss these matters, and seek to show that there has been an error of law committed by the Land Department and the courts, and we propose to argue the proposition from their own point of view as a convenient means whereby to demonstrate the untenable character of their argument, and will show that the business, as conducted February, 1892, could not have constituted, in law, a townsite occupation of the land and cannot supply the basis for the decree sought.

(1) Because it was conducted wholly upon the railroad right of way, which was reserved by law from townsite occupation or entry.

(2) Because no townsite law of the United States was ever complied with in respect thereto, and no record was ever made of any plat thereof, and the person making the plat sought and acquired under the homestead laws a part of the land covered by the so-called lots and blocks laid out, namely, John G. Nagel.

(3) Because it was not the intention of those conducting such small amount of business as was conducted that the same should be a townsite.

(4) Because every vestige thereof was abandoned without application for townsite entry ever having been made therefor.

(5) Because the parties severally conducting said business leased from the railroad and are estopped from denying that the land in controversy was subject to homestead entry by the fact that they were severally homestead claimants therefor themselves.

(6) Because one store, one hotel, and one saloon does not, in law, constitute a town, and it was competent for the Land Department to decide the fact of the existence or nonexistence of a town, and this question of fact was decided in the negative.

efore discussing the law applicable to this phase of the , it is deemed proper to quote at some length the state- nt of the facts by the Land Department contained in the artmental decisions of May 22, 1899 (R., 34), and May 1903 (R., 45). In the first-mentioned decision the fol- ing statement was quoted by the Secretary of the In- or with approval from the decision of the Register and eiver of the United States Land Office (R., 36-39):

"The facts leading up to the controversy are stated by the al officers, who heard the testimony, as follows:

"From the testimony it appears that one John G. Nagel, ated as a homestead, in the year 1884, all that portion of tract in controversy north of the Northern Pacific Rail- d track; that he cleared, improved, and cultivated the ne; that afterwards he conducted a small general mer- ndise store, in connection with his said homestead, and ntinued to conduct the said store up to the year 1889.

"In 1889 a discovery of mineral was made in the adjoin- g section, which caused a mining excitement, when Mr. gel had a portion of the tract in controversy (which was en a part of his homestead) surveyed into lots and blocks, *t as a townsite*, but, to use Mr. Nagel's own words: 'To commodate the business then demanded.'

"(See Nagel's testimony, page 53).

"A plat of said survey is filed with the testimony and arked 'Contestant's Exhibit D,' said plat *does not give the undaries of the tract of land embraced therein*, nor the *ea*, nor *any statement of the extent and general character the improvements; it is not verified; it does not appear to ve been filed with the recorder of the county* within which e land is situated, nor in the *local land office*, nor in the *eneral land office*, in fact it does not in *any particular com- ly or attempt to comply with the provisions of sections 380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, nited States Revised Statutes*. The testimony shows that ne lots and blocks on said plat commence at a point one undred and fifteen feet north from the center of the North- rn Pacific Railroad track, and that said lots are one hun- red and ten feet deep; that *all the business buildings* were rected on the *front row of lots* as shown by contestant's Ex- ibit 'D,' thus it will be noticed that all of said business

into lots and blocks, streets and alleys, a plat of which is filed herein marked contestant's Exhibit 'A' (Rec., 470-471).

"It further appears from the testimony and exhibits that about twenty-five feet of the north or back end of the lots as surveyed in 1889 as shown by contestant's Exhibit 'D' (R., 471) is and was off of the right of way and on the tract in controversy, and Nagel and Butler testify on rebuttal that said twenty-five feet was used in connection with their business.

"Nagel, Butler, and Whitcomb failing to exercise whatever rights they claimed as settlers under the homestead laws within the statutory period waived the same.

"*Whitcomb*, according to his own testimony (page 24), *intended to enter* the tract in controversy as a *homsetead* up to *September, 1895*.

"*Butler*, according to his own testimony (page 44), told a dozen people that it was his *intention to enter* the tract in controversy as a *homestead* as late as *August, 1895*.

"Nagel, according to his own testimony (page 59), *intended* to include the tract in controversy in his *homestead entry as late as 1895*.

"Thus it will be noticed that *all of the parties now engaged in business on the tract in controversy intended to enter the same under the homestead laws. They certainly could not be asserting and maintaining claim to the tract in controversy under the homestead laws and under the townsite laws at the same time.*" (Italics supplied.)

On page 44 of the record the Secretary, in speaking of the status of the land at the time the Government survey was made in the field (summer of 1893), said:

"In the case at bar, at the time of the survey in the field, White was the only settler on this subdivision except Whitcomb, the other parties *at that time being located on the right of way*, and as to them *White's right, as a prior settler, attached to the entire tract from such time*. Any right Whitcomb may have had as a homestead settler by reason of his settlement before survey in the field, is lost by his failure to assert the same under the homestead laws."

"The evidence shows that *after the survey in the field* White made *claim to the entire tract and exercised rights of*

ownership over the same. It was necessary for him to adjust his settlement claim to the lines of the public survey, and in so doing to include the legal subdivision on which his improvements were placed." (Italics supplied.)

In the last departmental decision, dated May 1, 1903, the Department, among other things (R., 47-48), said:

"These parties north of the road were located upon lots that had been platted and *leased to them in 1889* by one Nagel, who was the first settler there and *who then intended to take the land north of the road as a homestead.* This purpose, however, he subsequently abandoned, *and took as his homestead land adjoining on the north.*" * * *

"The testimony covering these inquiries is to some extent conflicting, but the *preponderance of the testimony submitted at both hearings goes to show that at the date of White's establishment of residence all of the business houses and all but one of the townsite occupants' residences were located on the right of way, except Whitcomb's which was south of the road.*" (Italics supplied.)

Thus we have clear and unequivocal findings of fact by the Land Department to the effect:

(1) That the plat of 1889 was not intended as a townsite by the person who made it, and was never recorded.

(2) That no provision of the townsite laws of the United States was complied with in respect thereto.

(3) That all of the places of business were situated *wholly upon the railroad right of way until 1894 and 1895.*

(4) That any and all right to use the land when the buildings were so located on the railroad land was negatived by the fact that each and every of the occupants *paid rent therefor to the railroad company.*

(5) That after the removal from the right of way each and every of the persons who removed *intended to,* and gave out the fact that they severally would, *seek the land under the homestead laws of the United States.*

(6) That although the greater part of the lots and blocks so unofficially laid out by John Nagel in 1889 extended over

buildings were erected *on the right of way* of the Northern Pacific Railroad Company, and *not on the tract in controversy.* A reference to contestant's Exhibit 'A' will show the exact location of all buildings at Clark's Fork in December, 1892. Witnesses Nagel and Butler testify that when they built their houses they supposed the right of way of the Northern Pacific R. R. Co. was only one hundred feet on each side of the center of the main track, and that they supposed their houses were on the tract in controversy, up to some time in 1893, when the Northern Pacific R. R. Co. asserted its right to the land, and *leased the ground upon which all the business houses at Clark's Fork were located to the respective owners of said houses.*

"This fact is stoutly denied by all of the witnesses for the contestee, and especially by one S. R. Catlow, who testifies that the width of the right of way was discussed by nearly every person in Clark's Fork during the fall of 1889 and the winter of 1890; that he wrote to the General Land Office, and was informed that the right of way was two hundred feet from each side of the center of the track; *that this letter was public property, and was shown to nearly every person in and around Clark's Fork* (Catlow's testimony, page 124).

"In 1891 John E. White, the contestee, located with other lands nearly all of the tract in controversy south of the Northern Pacific Railroad track, and commenced the erection of a dwelling thereon, and established actual residence in said house, with his family, in February, 1892, and has resided thereon, improved and cultivated the same continuously since 1892, and is now residing thereon, his improvements being valued at $2,000.

"In 1891 M. P. Whitcomb (one of the applicants for the townsite) located as a homestead a small portion of the tract in controversy south of the Northern Pacific Railroad track, and erected a dwelling-house and established his residence therein during 1892, subsequent to that of White, and has continued to reside thereon and is now residing thereon. When the field work of the Government survey was made in 1893, Whitcomb's residence or dwelling-house was found to be partly on the tract in controversy and partly on section No. 3.

"Thus the tract remained *from 1889 to 1893* with the store of *Nagel*, the hotel of Roberts, and the saloon of *Butler* located on the north side of the railroad track and on the

right of way of the Northern Pacific Railroad Company, and the residence of White and a portion of the residence of Whitcomb on the south of the railroad track.

"During 1893 after the field work of the Government survey was extended over the tract in controversy, *White, Whitcomb, Nagel* and *Butler* gave out that *they intended to enter the same under the homestead laws.*

"During 1893 the Northern Pacific Railroad Company asserted its right to the land occupied by Nagel, Roberts and Butler Bros., and *leased the same to the aforesaid parties,* and they and each of them continued to occupy said premises under said lease and *not otherwise* up to the *summer of 1894,* when the Northern Pacific Railroad Company refused to further lease said premises to the Butler Bros., and notified them to remove their buildings off from the right of way, which they did some time in the *fall of 1894,* and moved their said buildings upon the tract in controversy.

"The contestee testifies that in the spring of 1895, Whitcomb and Nagel attempted to effect a compromise, so that a joint filing could be made under the homestead laws, by which said Nagel, Whitcomb and contestee could perfect title to the land claimed by each of them prior to survey. This the contestee refused to do, and soon *thereafter* the said Whitcomb and Nagel commenced the erection of a store building and occupied the same as a general merchandise store on the tract in controversy and off of the right of way. *Roberts continues to lease the railroad company, and his place of business is now located on the right of way* of the Northern Pacific Railroad Company. Thus the matter stood until October 26, 1895, when notice was published that on and after the 27th day of November, 1895, the official plats of said township would be on file in this office, and that this office would receive filings or entries for lands in said township on and after said 27th day of November, 1895. On October 29, 1895, a petition (contestant's Exhibit 'C'), was filed with the probate judge in and for Kootenai County, Idaho, signed by *ten* persons, claiming to be residing on the tract in controversy, asking the said probate judge to secure said tract as a townsite under the name of Clark's Fork. *This appears to be the first attempt to obtain title to the tract in controversy under the townsite laws.*

"In pursuance to said petition the said probate judge caused a portion of the tract in controversy to be surveyed

onto the legal subdivision to the north of the land in question (Defendants' Exhibit No. 4, R., 470-471), said Nagel did seek and obtain a homestead patent therefor.

(7) That, as shown by the comparison of the plats of the two subdivisions, the whole of that part of the plat of 1889 covering a portion of the right of way was abandoned and the subsequent plat of 1895 (R., 470, Defendants' Exhibit No. 3) not only fails to subdivide any land on the right of way, but wholly disregards the plat of 1889, and fails to conform thereto in any respect whatsoever.

Not being of record and not having been prepared as a townsite, or, in its preparation, not having complied with any provision of the townsite laws of the United States, let us see if the occupancy on the railroad right of way could, by any construction, have given notice of a townsite within the meaning of the townsite laws.

It is contended, as a proposition of law, that even if a town had been laid out on the right of way and a plat had been filed, and the townsite claimants had, prior to February, 1892, or the date of the Government survey, in 1893, attempted to comply with the formalities required by the townsite law, and even if the Land Department had attempted to give such a so-called townsite a patent for the land on the right of way where their buildings were located when the rights of White attached, yet, nevertheless, such a town, so located, would have had no legal effect whatever, and would not have prevented the rights of the defendants in error from attaching to that part of the legal subdivision not covered by the railroad right of way.

In support of this hypothetical proposition it will be shown—

(A) That the land embraced within said right of way was reserved by law from townsite occupation or entry;

(B) That even a patent of the United States therefor would have been void; and, in contemplation of law, whatever may have been the intention of the occupants, or even

the disposition of the railroad company, the occupancy of said railroad right of way up to 1894 and 1895 was illegal and of no valid effect whatsoever.

(A.)

Right of Way Reserved from Occupation.

The general townsite laws of the United States constitute chapter VIII of the Revised Statutes (of 1878), embracing sections 2380 to 2394, both inclusive.

By reference to these sections, including section 2387, under which the plaintiffs in error claim, it will be readily observed that townsites could or can only be established upon some "portion of the *public lands;*" and, by section 2393, it is expressly provided that:

"The provisions of this chapter shall not apply to military or other reservations heretofore made by the United States, nor to reservations for light-houses, custom-houses, mints, *or such other public purposes as the interests of the United States may require,* whether held under reservation through the Land Office by title derived from the Crown of Spain, *or otherwise.*" (Italics supplied.)

This court has repeatedly considered the legal effect of grants of Congress of rights of way to railroad companies through the public lands of the United States. Fortunately, since the decision by the Secretary of the Interior in this case (28 L. D., 412, 416), this court has passed upon the identical grant to the particular railroad, the effect of the occupancy of whose right of way is involved in this discussion, and it is unnecessary, therefore, to refer in detail to the views entertained by the Secretary of the Interior in his said decision, similar to those given by this court.

In the case of the Northern Pacific Railway Company *v.* Townsend, 190 U. S., 267, 270, 271, this court had under consideration the identical grant of Congress, whereby the four-hundred-foot strip traversing the land in controversy

was removed from the public domain and granted unto the Northern Pacific Railroad Company by the act approved July 2, 1864 (13 Stat., 365), section 2. In this case Mr Justice White, in delivering the opinion of this court—on a conflict between said railway company and a patentee of the United States who, in addition to holding a homestead patent, covering the legal subdivision traversed thereby, had held and cultivated the land on the right of way for the full period of prescription—said:

"At the outset, we promise that, as the grant of the right of way, the filing of the map of definite location, and the construction of the railroad within the quarter section in question preceded the filing of the homestead entries on such section, the land forming the right of way therein was *taken out of the category of public lands* subject to preemption and sale, *and the Land Department was therefore without authority to convey rights therein.* It follows that the homesteaders acquired no interest in the land within the right of way because of the fact that the grant to them was of the full legal subdivisions." * * *

"Following decisions of this court construing grants of rights of way similar in tenor to the grant now being considered, New Mexico *v.* United Trust Company, 172 U. S. 171, 181; St. Joseph & Denver City R. R. Co., *v.* Baldwin 103 U. S., 426, it must be held that the *fee passed by the grant* made in section 2 of the act of July 2, 1864. But although there was a present grant, it was yet subject to conditions expressly stated in the act, and also (to quote the language of the Baldwin case) 'to those necessarily implied, such as that the road shall * * * be used for the purposes designed.' Manifestly, the land forming the right of way was not granted with the intent that it might be absolutely disposed of at the *volition of the company.* On the contrary the grant was explicitly stated to be *for a designated purpose* one which negated the existence of the power to voluntarily alienate the right of way or any portion thereof.

"The *substantial consideration inducing the grant was the perpetual use of the land for the legitimate purposes of the railroad*, just as though the land had been conveyed in terms to have and to hold the same so long as it was used for the railroad right of way. In effect the grant was of a limited

fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted. This being the nature of the title to the land granted for the special purpose named, it is evident that to give such efficacy to a statute of limitations of a State as would operate to confer a permanent right of possession to any portion thereof upon an individual for his private use, would be to allow that to be done by indirection which could not be done directly, for, as said in Grand Trunk Railroad *v.* Richardson, 91 U. S., 454, 468, 'a railroad company is not at liberty to alienate any part of its roadway so as to interfere with the full exercise of the franchises granted.' Nor can it be rightfully contended that the portion of the right of way appropriated was not necessary for the execution of the powers conferred by Congress, for, as said in Northern Pacific Railroad Co. *v.* Smith, 171 U. S., 261, 275, speaking of the very grant under consideration: 'By granting a right of way four hundred feet in width, Congress must be understood to have conclusively determined that a strip of that width was necessary for a *public work* of such importance.' Neither courts nor juries, therefore, nor the general public, may be permitted to conjecture that a portion of such right of way is no longer needed for the use of the railroad and title to it has vested in whosoever chooses to occupy the same. The whole of the granted right of way must be presumed to be necessary for the purposes of the railroad, as against a claim by an individual of an exclusive right of possession for private purposes.

"To repeat, the right of way was given in order that the *obligations to the United States assumed in the acceptance of the act might be performed.* Congress having plainly manifested its intention that the title to and possession of the right of way should continue in the original grantee, its successors and assigns, so long as the railroad was maintained, the possession by *individuals of portions of the right of way* cannot be treated without overthrowing the act of Congress as forming the basis of an adverse possession which may ripen into a title good as against the railroad company." (Italics supplied.)

Thus it is clear that the land embraced within the railroad right of way in February, 1892, when the defendants in error

established their residence, was not only reserved from townsite entry under the townsite laws of the United States and a limited fee was then vested in the Railroad Company, but the title was so held that the Railroad Company itself could not dispose of any part thereof to any possible townsite occupant for use as a townsite, nor could a right to use the same be acquired by prescription through the acquiescence of the Railroad Company.

(B.)

A Townsite Patent Would Have Been Void.

The land within the limits of the right of way, as occupied February, 1892, having been reserved and appropriated by Congress for a public use, namely, as a right of way for an intercontinental railroad, it was beyond the power of the Land Department by patent to have accorded to any persons whomsoever a right to appropriate the same for a townsite.

In the case of Burfenning *v.* Chicago, St. Paul, etc., Ry., 163 U. S., 321, 324, this court, in its opinion, delivered by Mr. Justice Brewer, said:

"But it is also equally true that when by act of Congress a tract of land has been reserved from homestead and preemption, or *dedicated to any special use*, proceedings in the Land Department in defiance of such reservation or dedication, although culminating in a patent, transfer no title, and may be challenged in an action of law. In other words, the action of the Land Department cannot override the expressed will of Congress, or convey away public lands in disregard or defiance thereof. Smelting Co. *v.* Kemp, 104 U. S., 636-646; Wright *v.* Rosebury, 121 U. S., 488, 519; Doolan *v.* Carr, 125 U. S., 618; Davis's Admr. *v.* Weibbold, 139 U. S., 507, 529; Knight *v.* U. S. Land Ass'n, 142 U. S., 161."

In the case of Northern Pacific Railroad Company, 171 U. S., 260, wherein the townsite plat was made and the occupancy thereunder began prior to the location of the route of

the Northern Pacific Railroad Company across the tract, so platted and subdivided, and the land on the right of way was thereafter patented to the mayor of the city of Bismark under section 2387 of the Revised Statutes of the United States as a townsite, yet, nevertheless, because the plat was not "filed in the registrar's office" and *entry* made prior to the location and construction of the Northern Pacific Railroad under its grant across the land, the grantee of the authorities of the townsite, holding under patent from the United States a certain lot on the right of way, so acquired by the Northern Pacific Railroad Company, this court held that the right of possession by the railroad was superior to that of the holder under the townsite patent, even in a court of law. This court in that case said:

"If, then, one seeking to appropriate to himself a portion of the public lands cannot, no matter how long his occupation or how large his improvements, maintain a right of possession against the United States or their grantees, unless he has, by *entry and payment of the purchase money*, created in himself a vested right, is one who claims under a townsite grant in any better position?

"No cases are cited to that effect; nor does there seem to be any reason, in the nature of things, why rights created under a townsite settlement *should be carried back, by operation of law, so as to defeat the title of a party who had, under color of right, taken possession and made valuable improvements before the entry under the townsite act.*" (Italics supplied.)

Thus it will be seen that even a patent of the United States to the mayor of a city for land embraced within the limits of the right of way of the Northern Pacific Railroad Company was held to be void in a court of law as of no legal effect whatsoever so far as any rights were claimed to have been conferred upon said city or its grantee of a lot situated on the railroad right of way.

Therefore, in contemplation of law, the occupation of the railroad right of way, traversing the land in contro-

versy, by one store, one saloon, and one hotel, as in the ca
at bar, or by any number of buildings actually used for pu
poses of trade and business, had no legal effect whatsoeve
And the occupation of this land in 1891 and 1892 by *o*
store, *one saloon*, and *one hotel* situated, as found by th
Secretary of the Interior, *wholly upon the railroad right o*
way, could not, by any course of reasoning, have constitute
the townsite occupation which would reserve the unsurveye
land of the United States off of the right of way from settl
ment and residence on the part of a *bona fide* homestea
claimant.

ABANDONMENT.

But even if there had been a townsite occupancy at th
time of the settlement of Mr. White, the findings of th
Land Department are clear that the same was abandoned
Inasmuch as it affirmatively appears that Mr. White was
bona fide homestead settler and claimant, continuously fro
the time of the initiation of his settlement in 1891 until
patent was issued to him in 1903, it is essential that plain
tiffs in error should not only show that there was a townsit
on the land in 1891, but also that said townsite was neve
at any time thereafter abandoned. This, of course, the
cannot do.

Abandonment is a question of fact upon which the find
ings of the proper officers of the Land Department are final

Boise City *v.* Flannagan, 6 Idaho, 153.

The findings of the Land Department are, in effect, tha
the occupation as it existed in 1891 was abandoned; and
the documentary evidences submitted by plaintiffs in erro
show this. Besides the facts and circumstances found by th
Land Department lead irresistably to this conclusion.

In the first place the Land Department finds as a fact tha
it was never the intention of Mr. Nagel, who made the pla
of 1889, to establish a townsite; but, on the contrary, it

was his purpose to seek the land under the homestead laws. It appears by the later decision of the Land Department that he did acquire, under the homestead laws, the tract adjoining the land in controversy immediately on the north, which tract as well as the railroad section to the west, was partially covered by the Nagel plat of 1889 (R., 177-178 Nagel's testimony).

Furthermore, the plat of 1895 (R., 470-471) shows that all of that portion of the land subdivided on the right of way, where the buildings stood in 1891, was abandoned; also that the part of the plat which extended to the west on the railroad, section 3, was abandoned; also that the part of it that extended over into the homestead of Mr. Nagel was abandoned; and it also clearly appears that there was no effort made to conform the plat of 1895 to the lots as laid out on paper in 1889, which lots appear not to have been numbered.

In addition to this, the very fact that, although the townsite laws of the United States in 1889 and ever thereafter, permitted an application and entry for a townsite on unsurveyed public lands of the United States, no effort was ever made, from 1889 to the latter part of 1895, to submit such application or make such entry.

In addition to all this, we have the findings of the Land Department to the effect that each and every of the persons doing business on the railroad right of way in 1891 and thereafter, leased the tracts which were used by them respectively on the right of way from the railroad company. Acceptance of leases from the railroad company was inconsistent with an alleged townsite claim.

Added to all this we have positive findings by the Land Department to the effect that each one of these parties intended to seek and was claiming the land under the homestead laws of the United States as late as August and September, 1895. The decision of the Secretary of the Interior of 1899, after reciting these facts in detail, continues as follows:

"Thus it will be noticed that all of the parties now engaged in business on the tract in controversy intended to enter the same under the homestead laws. *They certainly could not be asserting and maintaining claim to the tract in controversy under the homestead laws and under the townsite laws at the same time.*" (Italics supplied.)

Wherefore, the conclusion is irresistible, (1) that there was no valid townsite occupancy of any part of the land in controversy at the date of the initiation of the settlement of defendants in error, and (2) the invalid occupancy then existing, *situated wholly upon the railroad right of way*, was thereafter abandoned and each of the persons who conducted any business off of the right of way were themselves notoriously homestead claimants.

The rights of the defendants in error, therefore, attached to the land embraced within the legal subdivision as a result of the settlement, and continuous residence and cultivation by Mr. White, and, upon the making of the homestead entry on November 27, 1895, when the land first became subject to entry, his vested interest in the land reverted to the date of settlement, cut out all intervening adverse claims.

The proceedings begun, at the instance of disappointed homestead claimants on October 29, 1895, for the establishment of a townsite, therefore, could have no legal effect whatsoever as against the defendants in error, even if the laws of the United States had been accurately complied with at the time of the initiation of said townsite claim in 1895, which is not affirmatively shown.

Conclusion.

In conclusion, it is deemed not inappropriate to say that this is a case which, in the opinion of counsel for defendants in error, should never have been brought to this court. There is absolutely nothing in the case of a Federal character which is not based entirely upon questions of fact or

mixed questions of fact and law, which have been disposed of by the decisions of the Land Department adversely to the contention of the plaintiffs in error. Under numberless authorities, some of which have been cited above, this court is without power to go behind findings of fact or mixed questions of law and fact by the Land Department. The effort on the part of plaintiffs in error to bring the case within exceptions to that rule was not accomplished by the averments of their complaint, but even the alleged facts whereby an inquiry of a court was sought were determined adversely to their contentions by the courts below, and this court has repeatedly held that it will not inquire into questions of fact upon a writ of error to the Supreme Court of a State. Thus there is nothing which it is proper to present to this court on that phase of the case.

The plaintiffs in error will seek to justify their conduct in prolonging this litigation, first through the Land Department and then through the courts, for nearly fourteen years *obtaining possession of the property in the meantime*, on the so-called ground that they are morally entitled to the land in question. Were it in harmony with the course ordinarily pursued by this court to go into the evidence adduced before the Land Department, it would be seen, from the voluminous record, that every facility was afforded by the Land Department to the townsite claimants to prove their various, and sometimes inconsistent, averments against the validity of the settlement and the good faith of the homestead patentee. Instead of sustaining their charges, this record shows that every means have been used to coerce, defame, and vilify the defendants in error and to misrepresent the true facts on which the rights of the defendants in error are based, without securing a finding by the Land Department which reflects in any way upon the character or good faith or valid rights of the defendants in error.

And this record supplies a rare illustration of honest, upright, and courageous, though dangerous, adherence to

duty on the part of a homestead settler, dominated and controlled by the idea that the laws of this Government were sufficient to protect the property rights of himself and his family, even against the encroachments of merciless and unscrupulous foes, who have waged a relentless war upon him and his family from the day he refused to divide the land with other home-stead claimants, whose claims he knew and they knew were secondary and subordinate to his under the laws of the United States.

GEORGE H. LAMAR,
H. M. STEPHENS,
Counsel for Defendants in Error.

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No. 185

IN THE

Supreme Court

of the United States

OCTOBER TERM 1908

JOHN B. WHITCOMB, surviving partner of the firm of MOSES P. WHITCOMB and JOHN B. WHITCOMB, Co-Partners as WHITCOMB BROTHERS, *et al.*,
Plaintiffs in Error.

vs.

JOHN E. WHITE and ROBERT B. WHITE,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO

BRIEF OF PLAINTIFFS IN ERROR

ALBERT ALLEN,
Attorney for Plaintiffs in Error.

EMPIRE PRINTING CO 419 SPRAGUE

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Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO

BRIEF OF PLAINTIFFS IN ERROR

This is an action of ejectment brought by the defendants in error against the plaintiffs in error in the District Court of the State of Idaho to recover possession of the W. ¼ of the S. W.¼ and lots five, six and seven of section two, township 55, north of range two W. B. M., in Kootenai County, Idaho.

The defendants in error in their amended complaint al-

leged ownership of the premises by virtue of a homestead entry and final proof made on the 27th day of Nov., 1897, and patent issued therefor on July 14, 1903.

Amended Complaint, Trans. 2 to 6

The plaintiffs in error (defendant's below) in their answer denied that they were or even had been in possession of said lots 5, 6 and 7 or of that part of the N. W. ¼ of the S. W. ¼ of said section 2, lying south of the right of way of the Northern Pacific Railroad and east of the county road, and denied that defendants in error were ever the owners in fee or otherwise or entitled to the possession of any part of the premises described in the amended complaint, excepting said lots 5, 6 and 7, and that part of the N. W. ¼ of S. W. ¼, lying south of said right of way of the Northern Pacific Railroad and east of said county road, and admitted that they were severally in possession of small portions of that part of said N. W. ¼ of S. W. ¼ not lying south of said right of way and east of said county road.

(Paragraph 2 of Answer Trans. 8 and 9.)

(These issues will more readily be understood by reference to the map of the townsite of Clarke's Fork, N. W. ¼ of S. W. ¼, sec. 2, showing the railroad and county road, marked "Defendant's Exhibit No. 3," found between pages 470 and 471 of Trans., which was also an exhibit in the contest proceedings in the land office. The ma-

platted portion in the southeast corner of the forty and east of the county road being the land settled upon by the defendant in error, John E. White.)

The answer further admitted that defendant in error, John E. White, in form made final proof in the land office for the premises described in the amended complaint, and that on July 14, 1903, a patent in form issued therefor to the defendant in error, John E. White, but denied that by said final proof or by said patent or otherwise, defendants in error or either of them acquired any title to said N. W. ¼ of S. W. ¼, and denied that defendants in error, or either of them were or ever had been entitled to the possession of any portion of the premises, excepting said lots 5, 6 and 7, and that part of the N. W. ¼ of the S. W. ¼ lying south of the railroad right of way and east of the county road.

(Paragraphs 3, 4 and 5 of Answer, Trans. 9 and 10.)

For a further answer to the amended complaint and by way of cross complaint for affirmative relief, plaintiffs in error alleged as follows:

That in the year 1884, and while the premises were a part of the unsurveyed public land of the United States, and long before any settlement was made by the plaintiffs, or either of them, upon the lands described in the amended complaint, the part of the premises described in the amended complaint as the northwest quarter of

the southwest quarter (N. W. ¼ S. W. ¼) of section two (2), township fifty-five (55), north of range two (2), east of the Boise meridian, was settled upon, occupied and appropriated and used as a townsite for townsite purposes, and for purposes of trade and business and not for agriculture, and was then and ever since has been calledand known as Clark's Fork. That the said town then contained, and ever since has contained, a population of about one hundred (100) inhabitants, and then contained, and ever since has contained, a public railroad depot, a United States post office, hotels, saloons and residences. That said town was and is situated at the point where the Northern Pacific railroad crosses the Clarks Fork of the Columbia river, and at all times was and is the center of and the shipping and supply point of a large area of country in which a large business of lumbering, mining and farming was carried on; and that during all of said time large amounts of timber, lumber and other products of the country surrounding said town have continuously been shipped over said railroad from said town; and that said town and said northwest quarter of the southwest quarter (N. W. ¼ S. W. ¼) has at all times been an important center of business and trade.

II.

That these defendants and each of them are now residents and occupants of said town, and they and their

grantors and predecessors in interest have been residents and occupants of said town ever since long before the plaintiffs or either of them settled upon any of the lands described in said amended complaint.

III.

That on or about November 17th, 1890, and while the said land was a part of the unsurveyed lands of the United States, and at a time when the said northwest quarter of the southwest quarter (N. W. ¼ S. W. ¼) was occupied and used as a townsite and for purposes of business and trade, and not for agriculture, by these defendants and their grantors and predecessors, the plaintiff, John E. White, who was then the station agent of the Northern Pacific Railway Company at said town of Clarks Fork, claimed one hundred and sixty (160) acres of land lying south of the Northern Pacific railroad track and marked the boundaries thereof on the ground; and that thereafter in the year 1891, the said White erected thereon a dwelling house, and has with his wife ever since resided in said house. That said tract of one hundred and sixty (160) acres so claimed by the plaintiff, John E. White, and the boundaries marked on the ground included within its boundaries that part of what is now the said northwest quarter of the southwest quarter (N. W. ¼ S. W. ¼) of said section two (2) lying south of the right of way of said Northern Pacific railroad and east of the county road, containing five

and 94-100 (5.94) acres, and that said plaintiff did not at any time prior to the 27th day of November, 1895, claim any portion of said northwest quarter of the southwest quarter (N. W. ¼ S. W. ¼) other than the said part thereof lying south of said right of way and east of the county road.

IV.

That the inhabitants of said townsite of Clarks Fork caused said townsite to be surveyed and laid out into lots, blocks, streets and alleys, by William Ashley, Jr., a competent surveyor, prior to the 22d day of November, 1895, and caused a map or plat thereof to be made and certified to by William Ashley, Jr., and verified by Henry Melder, judge of the probate court of said Kootenai County.

V.

That on the 27th day of November, 1895, the plaintiff, John E. White, with the intent to cheat and defraud the said town occupants and to obtain title to the lots, buildings and improvements of said town occupants, including these defendants, made homestead entry for the lands described in the complaint, including the said northwest quarter of the southwest quarter (N. W. ¼ S. W. ¼) of section two (2), falsely claiming that the same was unappropriated public lands, whereas in truth and in fact the said northwest quarter of the southwest quarter

(N. W. ¼ S. W. ¼) was then and at all times since long prior to his settlement had been occupied as a town, and for purposes of trade and business, and not for agriculture, and the same was under the law appropriated as and for a townsite, and the same was not subject to entry under the pre-emption or homestead laws, or for any other purpose except as a townsite for the use and benefit of the occupants of said town.

VI

That thereafter on the 8th day of January, 1896, the said Henry Meider, who was then the judge of the probate court, being the county seat of the said County of Kootenai, State of Idaho, being the county in which said townsite was situated, duly elected and qualified as such judge, for and in behalf of the occupants of said townsite of Clarks Fork, filed in the United States Land office at Coeur d'Alene, Idaho, a protest and contest against said homestead entry of said John E. White, in so far as the same included said northwest quarter of the southwest quarter (N. W. ¼ S. W. ¼) of said section (2), so as aforesaid occupied as a townsite, the same being supported by his affidavit, and accompanied by the said map or plat of said townsite, a copy of which map or plat is hereto attached and marked Exhibit "A," and hereby made a part of this answer and cross complaint. That thereafter a hearing was ordered to be had before the register and receiver of said land office, to determine

the rights to said land, as between the said plaintiff, John E. White, and the said town occupants, and said hearing was had and held before said register and receiver, and evidence was adduced before them by both parties. That upon said hearing the said town occupants offered to show by competent evidence that the lands included in said townsite never were claimed by the plaintiff, John E. White, prior to the date of his making his said homestead entry on November 27th, 1895, and offered to show by competent evidence that the claim of the said John E. White, as marked upon the ground, and as recorded by him in the county, did not include any portion of said townsite as surveyed and platted as aforesaid. But the said register and receiver overruled said offer, and refused to receive or consider such testimony.

That said register and receiver decided said contest in favor of said John E. White. That an appeal was taken from said decision to the honorable, the commissioner of the general land office, who affirmed the decision of said register and receiver, and that an appeal was taken from the said decision of said commissioner to the honorable secretary of the interior, who affirmed said decision of the commissioner and awarded the said land, to-wit: The northwest quarter of the southwest quarter (N. W. ¼ S. W. ¼) of said section two (2), to the said John E. White. That afterwards said secretary

the interior ordered a further hearing and additional stimony to be taken before said register and receiver, d in pursuance thereof further testimony was taken, d thereafter the honorable secretary of the interior ally decided said contest in favor of said John E. hite, and awarded him a patent for the lands, de-ribed in said amended complaint, including the said rthwest quarter of the southwest quarter (N. W. ¼ W. ¼) upon which said township was situated, and luding all the buildings and improvements of occu-nts of said town, including the buildings and improve-nts of the defendants, as well as the lands upon which same were situated, and that the patent so issued to plaintiff, John E. White, is the one mentioned in said ended complaint.

VII.

fendants further allege that by the ruling and ision of the said register and receiver refusing to ive or consider said competent evidence offered on alf of said town occupants, to show that prior to up to the 27th day of November, 1895, the claim John E. White, as located and marked upon the und, and as recorded by him, did not include any part said townsite, was partial to said White and an erro-us decision of the law applicable thereto, and greatly judiced the rights of said town occupants, including

these defendants, and prevented these defendants from a fair hearing.

VIII.

Defendants further allege that on said hearings and of them the undisputed facts showed that the said lands upon which said townsite was situated were occupied and used as a townsite and for purposes of business and trade, and not for agriculture, to the extent as surveyed and platted and shown upon said map long before the plaintiffs or either of them ever settled or attempted to settle upon any of the lands described in the said amended complaint, and that by reason of the existence of said townsite thereon, and the occupancy thereof as for a townsite, and its occupancy and use for the purposes of trade and business and not for agriculture, the same was not at the time when said White made settlement, or at the time when said White made homestead entry thereof on the 25th day of November, 1895, or at any time since subject to entry under the pre-emption or homestead laws of the United States. Yet, notwithstanding the law and notwithstanding the facts, the said register and receiver and the commissioner of the general land office and the secretary of the interior awarded said land to the plaintiff, John E. White, and in so doing they each and all held and decided that said land was subject to such entry under the homestead laws; but which decisions of said officers and each of them, these defendants allege were erroneous and contrary to law, and de-

fendants allege that by reason of said erroneous decisions of said officers and each of them, and the issuance of said patent to said John E. White under and pursuant to said erroneous decisions the said John E. White has wrongfully and illegally obtained the legal title to the said townsite as surveyed and platted as aforesaid, when in equity and in good conscience and under the laws of the United States a patent should have issued therefor to the said judge of said probate court in trust for the several use and benefit of the occupants thereof, according to their respective interests.

IX.

That these defendants are severally the equitable owners of and in the possession of the following described lots or parcels of said lands included within said townsite described according to said survey and plat, together with the buildings and improvements thereon, to-wit:

The defendant, John B. Whitcomb, as surviving partner of the firm, Moses P. Whitcomb and John B. Whitcomb, late co-partners doing business under the firm name of Whitcomb Brothers:

Lots 1 and 2, block 10, lots 6, 7, 8, 9, 10 and 13, block 5 and lots 7, 8, 9 and 10, block 8.

The defendants Le Roy H. Whitcomb and Martha Whitcomb, as sole heirs at law of Moses P. Whitcomb, deceased, Le Roy H. Whitcomb, as special administrator

of the estate of Moses P. Whitcomb, deceased. Lot 3, block 10 and all of blocks 11, 12, 13, 14, 15 and 16.

The defendanth, John Reed and Courtney D. Reed, his wife, lots 7, 8, 9 and 10, block 9, and lots 12, 13, 14 and 15, block 2.

The defendants M. W. Caldwell and Alice Caldwell, his wife, lots 5 and 6, block 9.

The defendants William Johnston and Hilma Johnston, his wife, lots 18, 19 and 20, block 4.

The defendants A. H. Hasselroth and Wilhelmina Hasselroth, his wife, lots 9 and 10, block 4, and lots 1 and 2, block 5.

The defendants, George Piatt and Elsie Piatt, his wife, lots 4, 5, 6, 7 and 8, block 4.

The defendants, Andrew Paulson and Alvena Paulson, his wife, lots 6, 7, 8, 9, 10 and 11, block 2.

The defendant, John Kirke, lots 8, 9, 10, 11 and 12, block 3.

The defendants, Brocklin Dougharty and Nora Dougharty, his wife, lot 11, block 5.

The defendants, Luke Cotter and Sadie Cotter, his wife, lot 12, block 5.

The defendants, Walter Fleming and Rose Fleming, his wife, lots 14 and 15, block 5.

The defendant, Charles Schindler, lots 3, 4 and 5.

The defendants, Jason Edwards and Julia Edwards, his wife, lots 1 and 2, block 9.

The defendants, Gordon Dougharty and Ida Dougharty, his wife, lots 4, 5, 6, 7 and 8, block 10.

The defendants, Mrs. Emma Lloyd, lots 4, 5 and 6, block 8.

The defendant, John B. Whitcomb, lots 11, 12, 13, 14 and 15, block 4.

The defendant, Frank Allen, lots 1, 2, 3, 4, 5, 6 and 7, block 3, and lots 1, 2, 3, 4, 5 and 6 block 1.

The defendant, T. B. McWilliams, lots 16 and 17, block 5.

And they and their grantors and predecessors respectively have been in the possession of said respectively have been in the possession of said respective plats or parcels of land ever since long prior to the settlement of the plaintiffs upon any of the lands described in the amended complaint; anddefendants allege that they have at their own cost and by their own labor improved their said respective lots or tracts of land, and made lasting and permanent buildings and improvements, and that the plaintiffs have contributed nothing to such improvements, and each of these defendants are respectively entitled to have a legal title to the lots or par-

cels of land so claimed, possessed and improved by them respectively, free from any claim or demand of the plaintiffs, and defendants offer to pay to the plaintiff the price he paid the government for lands included in said townsite as surveyed and described in said plat.

Wherefore the defendants pray the judgment and decree of this Court, as follows:

1st. That the plaintiffs take nothing by this action.

2d. That the plaintiffs be adjudged and decreed to hold the legal title to the lands included within the limits of said townsite, to-wit: The northwest quarter of the southwest quarter (N. W. ¼ S. W. ¼), section two (2), township fifty-five (55), north of range two (2), east of Boise meridian, except the part thereof lying south of the right of way of the Northern Pacific railroad and east of the county road, in trust for the several use and benefit of the occupants thereof, according to their respective interests, and adjudging and decreeing that the plaintiffs convey the same to the judge of the probate court of the said county of Kootenai in trust for the several use and benefit of the occupants thereof, according to their respective interests. Or that the plaintiffs convey to each of the defendants respectively the several tracts or parcels of land occupied and claimed by them respectively as hereinbefore described; and that in the event of the plaintiffs neglecting or refusing to execute such conveyance or conveyances, the Court appoint a com-

missioner with full power to execute such conveyances and direct him to make the same.

3d. That the defendants have such other and further relief in the premises as to the Court may seem just and equitable, and that defendants recover of and from the plaintiffs their costs in this action.

(See Trans., pages 10 to 16.)

The defendants in error filed answer to the cross complaint, denying all the material allegations thereof (Trans. 17 to 34), and attached to their answer to the cross complaint the decision of the Hhnorable Secretary of the Interior, of May 22, 1899, and the decision of the Acting Secretary of the Interior of May 1, 1903.

(Trans., 34 to 49.)

On these issues a trial was had before the Court without a jury, and upon the trial all of the testimony taken before the register of land office in the two hearings was introduced, and is found in the record as "Defendant's Exhibit No. 1," commencing on page 146 of the Transcript, and extending to and including page 443 of the Transcript. There was some other evidence taken at the trial, but most of it only related to the question of damages or rental values.

The Court made findings and entered judgment against plaintiffs in error for restitution of all the land described

in the complaint and for certain damages and costs.

(Trans., 52 to 66.)

The Courth in its thirty-sixth finding of foct copied the decision of the Secrfetary of the Interior of date May 22, 1899. (Trans., 34 to 45, and the decision of the Assistant Secretary of Interior.

(Trans., 45 to 49.)

The only conclusions of law found by the Court necessary to be considered here are the first, sixth, seventh, eighth, ninth, and eleventh conclusions of law, Trans., pp. 59, 60 and 61, and which are as follows:

Conclusions of Law.

The Court finds as conclusions of law:

I.

That the plaintiffs are the owners in fee simple of the property involved in this action and of all improvements situated upon the said real estate, and are entitled to have the immediate, sole and exclusive possession of said property and the whole and every part thereof, and are entitled to recover the same, or any part thereof held by the defendants or either of them, from the defendants and each of them.

That the findings of fact and all questions of mixed law and fact made or found by the officers of the Department of the Interior are binding and conclusive upon this

court, and no allegation has been made in the answer of the defendants, or the cross complaint of the defendants, or any evidence offered which authorizes this Court to reinvestigate or relitigate the facts or any fact of this case which were raised or attempted to be raised by the answer or cross complaint, or either of them herein, and the only issues of fact that are open in this court to determination between the plaintiffs and defendants in this action are those relating to the matter of the use and occupation by the defendants of the premises in controversy or such portions thereof as have been by the defendants severally occupied and wrongfully detained and held by the defendants jointly or severally.

VII.

That the pleadings of the defendants herein or the evidence offered by them or either thereof are not sufficient to authorize, permit or warrant this Court to reinvestigate or relitigate the questions of fact or any question of fact which have heretofore been presented to and litigated in or determined by the Department of the Interior, or which might have been presented or litigated in or determined by said Department or the officers thereof.

VIII.

That the patent of the plaintiffs in this action transferred to them the legal fee-simple and indefensible title.

IX.

That the defendants or either of them have no right claim, title or interest in or to the property involved in this action or any part thereof; and that the claims of defendants and each of them to the said property, or any part thereof, or of any other person by or through the alleged townsite claimants or any or either of them, under the laws of Congress, or any or either of them, are and each of them is without foundation therefor and of no force or effect whatsoever.

X.

That the improvements upon the property in controversy and involved in this action or any part thereof placed thereon by the defendants or either of them, or any person by, through or under whom the defendants or either of them hold or claim, or pretend to hold or claim, or put or placed upon said property by any of said alleged townsite claimants, being to and are the property of the plaintiffs in this action.

XI.

That upon the cross complaint of the defendants herein and the answer of the plaintiffs to said cross complaint, plaintiffs are entitled to have the title of and to said property involved in this action and the whole and every part thereof quieted, and any and every cloud cast or put thereon by the defendants or either of them removed

nd for naught held, and all the adverse claims of de-
endants or either of them, or any person claiming or
o claim or hereafter claiming by, through or under the
efendants or either of, for naught held, cancelled and
ettled, and the title of the plaintiffs in and to the prop-
rty and premises aforesaid and the whole and every
art thereof, together with the improvements thereon,
uieted in the plaintiffs and freed from any and every
aim of the defendants and any and every person claim-
ng or to claim by, through or under the defendants or
ther of them.

These conclusions of law were followed and sub-
antially copied into the decree.

(See paragraphs 1, 2, 23, 24, 25, 26, and 28 of the
dgment.)

(Trans., 61 and 65, 66.)

After motion for new trial was made and overruled
n appeal was taken to the Supreme Court of the State
f Idaho, which Court, after argument, affirmed
he judgment of the lower Court in so far as it adjudged
nd decreed the respondents entitled to the immediate
ossession of the premises in controversy and remanded
he case with instructions to the trial Court to enter
n amended and modified judgment in favor of defend-
nts in error and against plaintiffs in error for the
ossession and restitution of the premises.

(See Judgment of Idaho Supreme Court, Trans. 472-3.)

The opinion of the Supreme Court of Idaho by Sullivan, Justice, is found in the Trans., pp. 475 to 486.

90 *Pacific Reporter*, 1080.

To review this judgment the writ of error in this case was sued out.

SPECIFICATIONS OF ERRORS.

The plaintiffs in error specify the following errors of the Supreme Court of Idaho, upon which they rely for a reversal of this case, all of which were set forth in the assignment of errors filed with the petition for writ of error, to-wit:

Assignments of Error.

1. Under Section 2387 of the Revised Statutes of the United States and other statutes of the United States relating to the sale and disposition of public lands, lands settled upon and occupied as a townsite, the lands in controversy in this action were not subject to entry under the agricultural preemption or homestead laws of the United States; and under the undisputed facts in evidence before the Land Department of the United States in the contest before said Land Department wherein Henry Melder, the probate judge of Kootenai county, Idaho, was contestant, and John E. White was contestee, the land in controversy in this suit was settled upon and occupied as a townsite long before any attempted settle-

ment thereon by said White; and thereafter the decision of the Land Department, being the decision of the Honorable Secretary of the Interior mentioned in the Answer and Cross Complaint of the plaintiffs in error (defendants below), and set up in the answer of the defendants in error (plaintiffs below) to said cross complaint dismissing the contest of the probate judge and awarding the land to White, was contrary to law and an erroneous construction of the law as applied to the undisputed facts, and the Supreme Court of Idaho erred in not holding said patent to be void.

2. Said Supreme Court of Idaho erred in not holding that under the statutes of the United States and under the undisputed facts in the case the homestead entry of John E. White should have been canceled and the probate judge allowed to enter the land in controversy in trust for the several uses and benefits of the town occupants.

3. Said Supreme Court of Idaho also erred in not holding that the title to the land in controversy acquired by said John E. White by the patent issued to him should in justice and equity and according to law belong to the town occupants.

4. The said Supreme Court of Idaho also erred in not holding and adjudging the title so acquired by said White to be held by him in trust for said town occupants.

5. The said Supreme Court of Idaho also erred in holding that the finding of the officers of the Land Department that White's claim and right was prior to that of the townsite claimants precluded the court from a consideration of that question. Such finding of the Land Department was contrary to all of the evidence before the Land Department. The undisputed facts in the case show that the land was settled upon and occupied as a townsite long before White's settlement, and that when White settled he marked out his claim on the south side of the Northern Pacific right of way east of the county road, taking in none of the improvements of the townsite claimants, and he could not, after the land was surveyed, change his boundaries so as to take in the improvements of the townsite claimants.

6. The said Supreme Court of Idaho erred in affirming that part of the judgment of the trial court which adjudged and decreed that the defendants in error were entitled to the immediate possession of the land in controversy and for all costs necessarily incurred in establishing the defendants in error's action of ejectment.

7. Said Supreme Court of Idaho also erred in remanding the case to the trial Court with instructions and directions to enter an amended and madified judgment in favor of the defendants in error (plaintiffs below) for the possession and restitution of the premises in controversy.

8. The said Supreme Court of Idaho erred in not reversing the judgment of the trial Court and not giving to the plaintiffs in error their rights under the statutes and laws of the United States as townsite occupants on the public lands of the United States.

From the findings of fact and conclusions of law of the lower Court hereinbefore quoted, viz.: Finding of Fact 36 (Trans. 59), Conclusions of Law 6, 7, 8 and 11 (Trans., 60 and 61), and from paragraphs 23, 24, 25 of the judgment of the lower Court (Trans., 65 and 66), and from the opinion of the Supreme Court of the State of Idaho (Trans., 475 to 486), it is apparent that the trial Court, as well as the State Supreme Court, treated the patent to the defendants in error as conclusive upon the question of title, and that both Courts held that they could not, under the answer or cross complaint or upon the evidence introduced, relitigate or retry any of the questions that were decided by the Land Department.

Therefore we consider it proper to and we shall in our argument consider all of the assignments or specifications of error together.

The Supreme Court of Idaho, in the opinion of the Court, seemed to feel that the decision of the Land Department was very unjust and inequitable and that the decision of the Secretary of the Interior was very

technical, but felt itself bound by the decision of the Secretary.

The Idaho Supreme Court found from the record, that White's claim did not cover more than about one-sixth of the forty, and say that White is now given the whole forty-acre tract regardless of the fact that the townsite claimants settled upon the land in perfect good faith prior to the time that White laid any claim to that part of the forty on the northerly side of the railroad, and they say: "*It might have been justice that the Land Department gave to the parties in its decision but there certainly was no equity in it.*" (The italics are ours.)

The Land Department decided as matter of law that White's settlement dated from 1891 Notwithstanding the undisputed facts show that his claim at that time was only to about five acres in the southwest corner of the forty, and notwithstanding the undisputed facts show that he never made any claim to the part north of the railroad track until he filed his homestead entry upon it in November, 1895. White's own evidence shows that the only thing to indicate a claim to the land north of the railroad track was the fact that his cattle at times roamed there the same as they did on other vacant land in the vicinity. His alleged claim and possession to land on the north side of the railroad under the undisputed facts in the case was no claim at all, and when the Secretary of the Interior permitted him to shift his

boundaries by his entry so as to take in the whole forty, when he had previously only claimed or occupied one-sixth of it and thereby to acquire title to many thousands of dollars worth of improvements placed upon the land in good faith by the townsite settlers, it was surely an erroneous conclusion or decision on the law and was entirely sufficient under the authorities to have authorized the Supreme Court of Idaho to have corrected the wrong and to have decreed that White should hold the land in trust for the benefit of the town occupants.

If the Land Department had cancelled White's entry and allowed the probate judge to have entered the land in trust for the benefit of the town occupants, each and all of the settlers, including Mr. White, would have acquired title from the probate judge for all that he possessed of the land, and thus exact justice would have been done.

The Revised Statutes of the United States, Section 2258, reads as follows:

> "Sec. 2258. The following classes of lands, unless otherwise specially provided for by law, shall not be subject to the rights of pre-emption, to-wit:
>
> "Second: Lands included within the limits of any incorporated town or selected as the site of a city or town.
>
> "Third: Lands actually settled and occupied for purposes of trade and business, and not for agriculture."

Section 2387 provides that:

> "Whenever any portion of the public lands have been or may be settled upon and occupied as a town-site not subject to entry under the agricultural pre-emption laws, it is lawful in case such town be incorporated, for the corporate authorities thereof, and if not, for the judge of the county court for the county in which such town is situated, to enter at the proper land office and at the minimum price, the land so settled and occupied, in trust for the several use and benefit of the occupants thereof, according to their respective interests; the execution of which trust as to the disposal of the lots in such town, and the proceeds of the sales thereof, to be conducted under such regulations as may be prescribed by the legislative authority of the State or Territory in which same may be situated."

Section 2389 provides that:

> "If upon surveyed lands, the entry shall in its exterior limit be made in conformity to the legal subdivisions of the public lands authorized by law, and where the inhabitants are in number one hundred and less than two hundred, shall embrace not exceeding 320 acres, and in cases where the inhabitants of such town are more than two hundred and less than one thousand, shall embrace not exceeding 640 acres, and where the number of inhabitants is one thousand and over one thousand, shall embrace not exceeding 1280 acres; but for each additional one thousand inhabitants, not exceeding five thousand in all, a further grant of 320 acres shall be allowed."

By Section 2289 of the Revised Statutes of the United States (the Homestead Law), it will be seen that a homestead could only be taken upon lands that were subject to pre-emption, so that sub-divisions two and three of

Section 2258 exclude lands within the limits of a townsite, or selected as a site for a city or town, from homestead entry, as well as pre-emption entry.

The only question in this case is whether the lands in controversy were within the limits of a townsite, or were selected as the site of a city or town, or whether they were used for the purposes of business and trade, and not for agriculture, at the time of the plaintiff White's entry of the same under the homestead laws. IF IT WAS SELECTED AS A SITE FOR A CITY OR TOWN, OR OCCUPIED FOR TOWNSITE PURPOSES, OR OCCUPIED FOR BUSINESS AND TRADE, THE HOMESTEAD AND PRE-EMPTION LAWS DID NOT APPLY TO THE SAME, AND DID NOT AUTHORIZE THE OFFICERS OF THE LAND DEPARTMENT TO PERMIT AN ENTRY THEREON OR TO ISSUE A PATENT THEREFOR.

The Act of Congress of March 3rd, 1877, entitled "An Act respecting the limits of reservations for townsites upon the public domain," 19 Statutes at Large, 392, 6 Fed. Anno., pages 353-354, provides:

> "Sec. 1. That the existence or incorporation of any town upon the public lands of the United States shall not be held to exclude from pre-emption or homestead entry a greater quantity than 2,560 acres of land, or the maximum area which may be entered as a townsite under existing laws, unless the entire tract claimed or incorporated as such townsite shall, including and in excess of the are above specified,

be actually settled upon, inhabited, improved and used for business and municipal purposes."

Here was a direct recognition by Congress that the laws of Congress prohibited entry of land within the limits of a townsite; that is to say, within the limits of what might be patented for such town, and putting a limit upon the amount, and providing how the surplus or excess might be entered by pre-emption or homestead claimants, as provided in the second section of that act.

The plaintiffs in error contend that the testimony taken before the land office on the hearing which was had between the probate judge and White, the plaintiff, showed conclusively that the land in controversy was within the limits of a townsite, and was land selected as a site for a city or town, and was occupied for purposes of business and trade, and not for agriculture, and was therefore not open to entry or patent by the plaintiff, under the homestead laws; and also contend that by reason of the error in law by the officers of the Land Department, the patent conveying the legal title was issued to the plaintiff for the forty acres upon which the town was situated, when it should in equity and good conscience and according to the laws of the United States have been issued to Mr. Melder, the probate judge, in trust for the several use and benefit of the town occupants; and that he having wrongfully acquired a patent title to the land, which, in equity and

under the laws of the United States, should have gone to the probate judge, in trust for the use and benefit of the town occupants, the Court should compel him to convey to the town occupants, or to the probate judge in trust for them, so much of the land as was occupied by the defendants.

In the case of Stark vs. Starrs, 6 Wallace, 402, at page 419, Judge Field, in delivering the opinion o fthe Court, after referring to the case of Garland vs. Wynn, 20 How. 6, and Lindsay vs. Hawes, 2 Black, 554, says:

> "These are only applications of the well-established doctrine that where one party has acquired the legal title to property to which another has the better right ,a court of equity will convert him into a trustee of the true owner, and compel him to convey the legal title."

In the case of Johnson vs. Towsley, 13 Wallace, 72, at page 85, after commenting upon the finality to be given to decisions by the officers of the Land Department, Mr. Justice Miller says:

> "And so, if for any other reason recognized by the courts of equity, as a ground of interference in such cases, the legal title has passed from the United States to one party, when, in equity and good conscience and by the laws which Congress has made on the subject, it ought to go to another, a court of equity will, in the language of this Court in the case of Stark vs. Starrs, just cited, 'convert him into a trustee of the true owner, and compel him to convey the legal title.' In numerous cases this has been announced to be the settled doctrine of this Court in reference to the action of the land officers."

At page 84 of the same case, Justice Miller says, after speaking of the powers of courts:

> "On the other hand there has always existed in the courts of equity the power in certain classes of cases, to inquire into and correct mistakes, injustice and wrong, both in judicial and executive action, however solemn the form which the result of that action may assume when it invades private rights; and by virtue of this power the final judgments of courts of law have been annulled or modified, and patents and other important instruments issuing from the crown, or other executive branch of the government, have been corrected or declared void, or other relief granted. No reason is perceived why the action of the land office should constitute an exception to this principle."

At page 86 of the decision, in speaking of the authority of the Court to review the decisions of the Land Office, the Court says:

> "Undoubtedly there has been in all of them some special ground for the exercise of the equitable jurisdiction, for this Court does not and never has asserted that all the matters passed upon by the Land Office are open to review in the courts. On the contrary, it is fully conceded that when those officers decide controverted questions of fact, in the absence of fraud, or imposition, or mistake, their decision on those questions is final, except as they may be reversed on appeal in that department. But we are not prepared to concede that when in the application of the facts as found by them they, by a misconstruction of the law, take from a party that to which he has acquired a legal right under the sanction of those laws, the courts are without power to give any relief. And this is precisely what this Court decided in the case of Minnesota vs. Batchelder (1 Wall. 109) and the case of Silver vs. Ladd

(7 Wall. 219). In this latter case a certificate under the Oregon donation law, given by the Register and Receiver, was set aside by the Commissioner and his action approved by the Secretary, and the action of each of these officers was based on a different construction of the act of Congress. This Court held that the Register and Receiver were right; that the certificate conferred a valid claim to the land, and that the patent issued to another party by reason of this mistake must inure to the benefit of the party who had the prior and better right. This Court has at all times been careful to guard itself against an invasion of the functions confided by law to other departments of the government, and in reference to the proceedings before the officers entrusted with the charge of selling the public lands, it has frequently and firmly refused to interfere with them in the discharge of their duties, either by mandamus or injunction, so long as the title remained in the United States, and the matter was rightfully before those officers for decision. On the other hand, it has constantly asserted the right of the proper courts to inquire, after the title had passed from the government, and the question became one of private right, whether, according to the established rules of equity and the acts of Congress concerning the public lands, the party holding that title should hold absolutely as his own or as trustee for another. And we are satisfied that the relations thus established between the courts and the Land Department are not only founded on a just view of the duties and powers of each, but are essential to the ends of justice and to a sound administration of the law."

On the trial of this case before the Register and Receiver of the Land Office, the contestant, who was the probate judge of Kootenai County, offered in evidence a certified copy of the possessory right of the contestee, John E. White, recorded in the office of the Recorder

for Kootenai County, Idaho, on the 18th day of November, 1890, and recorded in Book A of the possessory claims on page 139, marked "Contestant's Exhibit F." This document was objected to by the contestant on the ground it was immaterial, was hearsay, that the original was the best evidence, et cetera, and the objection was sustained and the document ruled out. (See Transcript, 232 and 233.) This document was offered in evidence and received in evidence on the trial of this case, and is found in the Transcripe, 442-3. This, we contend, was one erroneous decision by the land officers that greatly prejudiced the rights of the defendants, or the probate judge, who was acting in their behalf. A glance at the document and the map, Defendant's Exhibit No. 3, which was Contestant's Exhibit A in the Land Office, will show that the possessory claim of the plaintiff, as filed by him in the Recorder's office, did not cover any portion of the land in controversy in this suit. The description given in the possessory claim filed by him describes the land as: "Commencing at a point on the south side of the N. P. railway track about 200 yards east of the N. P. railway depot, at Clark's Fork river; thence south, to the bank of Clark's Fork river; thence east along the bank of Clark's Fork river one hundred and sixty rods east from said southwest corner; thence due north from said river to a point due east from the place of beginning. Thence west one hundred and sixty rods to the place of beginning. Said tract of land being

joined on the west by John McQuide's ranch, the place of beginning, and containing not more than one hundred and sixty acres." Then, at the close of the notice, he states: "I make this location under the laws of the Territory of Idaho, pursuant to the act entitled 'An act prescribing the mode of maintaining and defending possessory actions o nthe public land in the State of Idaho, approved December 10th, 1864. Signed, John E. White," in the presence of two witnesses.

(This notice as printed in the record is inaccurate and some of the description is left out. We will ask to supply a certified copy of the original to correct this error.)

From this notice it will be seen that the beginning point of White's land was south of the railroad and east of the depot. The railroad at that time was supposed to run substantially east and west, and Mr. White's ranch was entirely uponthe south side of the railroad track. The county road, as marked upon that map, was the west line of White's ranch and the east line of McQuide's ranch. Thus it will be seen that Mr. White's ranch took in no part of the premises actually occupied as a townsite, nor did he claim any portion of the land lying north of the railroad track, until he made his homestead entry thereon, on November 27th, 1895.

John B. Whitcomb, in testifying as to the situation and location of John E. White's squatter claim, testified as follows:

"Knew his claim that he made on the public land near Clark's Fork at the time I went there. It was situated on the south side of the Northern Pacific railroad track, and was on what was known as the McQuaid ranch at that time; later on it was on the road running south and down the railroad. The northeast corner of the ranch as he claimed it at that time was something very close to 200 yards from the depot of the Northern Pacific railroad at Clark's Fork; and the county road as it was laid out from the railroad to the river was Mr. White's west line at that time; the Northern Pacific railway was his north line.

I have lived there ever since. Mr. White first made claim that he claimed that portion of the N. W. ¼ of the S. W. ¼ of Sec. 2, the land in controversy, north of the railroad, in the fall of 1895, at the time he filed on it in the Land Office. I did not know of his making any claim to any portion of that land lying north of the railroad prior to the time he filed on it in the Land Office."

Roy Whitcomb, the son of M. P. Whitcomb, deceased, gave the following testimony as to the boundaries of John E. White's squatter claim:

"The boundaries of Mr. White's ranch as White first claimed it when he took up the place was east or south of the railroad track and west of father's place, Mr. P. Whitcomb's place, commonly known at that time as the McQuaid place. The northeast corner of White's ranch, with reference to the Northern Pacific depot at Clark's Fork, was somewheres about 200 yards, something about that, down the track, east of the depot, and then off to the south of the track; on the south side of the track, about 200 yards east of the depot, something like that.

As regards fence between M. P. Whitcomb's ranch and White's ranch being constructed at any time just the exact time of the fence being placed there I

couldn't say, but there was a fence between White's place and the Whitcomb place. The fence was there before White built his house. The north line of White's ranch, as he claimed it at that time, was south of the railroad track, parallel with the railroad track, running east, and south of the track.

The first I ever knew that Mr. White was claiming land on the north side of the railroad track was just before White made his filing which you say was November 27th, 1895; it was just before that filing.

As to when the houses that were on the right of way, that had been on the right of way of the Northern Pacific railroad, were moved back to the north off the right of way, will say the store was moved back in '95, along in the summer; the buildings on the right of way were moved back in '94 and '95, before White began to claim his land on the north side."

Gordon Dougherty testified that the first he learned that White claimed the land north of the right of way was just after White filed upon the land, November 27th, 1895.

(Transcript, 102-3.)

M. P. Whitcomb testified before the Land Office that his store building, which was Whitcomb Bros.' store, was moved off of the railroad right of way in August, 1895; that his residence was on the south side of the right of way and west of the county road on the platted part of the townsite lying south of the right of way and that White never claimed any land north of the right of way nor west of the county road.

(Transcript, 21 to 37.)

George W. Roberts, a witness for White before the Land Office, testified that Mr. White never occupied any portion of the land in controversy north of the right of way nor any portion of the land in controversy south of the right of way and west of the county road.

(Transcript, 191.)

M. P. Stephens, a witness for White before the Land Office, testified that White did not occupy or cultivate any part of the forty acres in dispute north of the railroad track prior to the public survey.

(Transcript, 199.)

H. A. Brown, a witness for White in the Land Office, testified that the buildings were moved off the right of way to the present positions in the summer of 1895 and Butler's building was moved in the spring of 1894. (Transcript, 203.) And, at page 206, he also testified that White did not occupy or cultivate any part of the forty acres in dispute north of the railroad track nor south of the track and west of the county road.

Compton White, the son of John E. White, in testifying before the Land Office for his father, undertook to testify that his father occupied the land in dispute north of the railroad track, but he only showed that his father's cattle, in common with other cattle, sometimes pastured there and it was not enclosed.

(Transcript, 216.)

John E. White, the principal defendant in error,

ndertook to testify that he had been in possession of he part of the forty (40) acres in dispute north of the ailroad track before he filed upon it. On being cross-xamined upon the subject it is clearly shown by his wn testimony under oath that he bases this claim of ossession upon the fact that a portion of the ground ot occupied by the townsite settlers was not fenced nd that his cattle ranged over this vacant ground the ame as they did over other vacant grounds in that sec-on of the country.

It also appears from his cross-examination that he ought the buildings of Mrs. Thibedeau, one of the town-te settlers, and thereby obtained possession of two lots. he following is an extract of his cross-examination upon ese subjects:

"I had one plat of ground which was called by the townsite people two lots; had another lot or two; used the whole of that land for grazing purposes; don't understand just how to use the word 'occupy.' As to whether I mean that my cattle ran out sometimes across the railroad track and went on these lots, will say, yes, and went on the other land, too. They went wherever they pleased. As to whether I can say I occupied those lots north of the railroad track any more than I did any other land north of the railroad track, will say, there was none of it fenced. Cattle would go where they pleased, but I always considered they were on my land when they were grazing on that land on that side of the railroad track. I considered that as much possession as the other. I had a house I had bought from Mrs. Thibedeau. She was one of the townsite claimants; did not buy the lot from her; bought the house

from her. There was a small enclosure, occupied one of said lots. I had two other alleged lots there which I got from the government by having the homestead and settling on it."

"As to what particular pieces of land north of this railroad track any of the defendants have occupied, will say, every available piece of ground, every piece they call a lot, every little plot of ground has been fenced and taken possession of by some one of these squatters. I do not undertake to say they are all in possession now since I got my patent."

(Stt Transcript, pp. 71 and 72.)

Judge Melder, the probate judge of Kootenai County, laid out the townsite in the early part of the summer of 1889.

(Testimony of S. R. Katlow, 217.)

There was much other testimony in the case showing that the townsite was first laid off in 1889, and platted. The most of the buildings, however, were at this time upon the right of way of the Northern Pacific Railroad Company, the townsite occupants supposing at that time that the right of way was only one hundred feet in width on each side of the center line of the railroad, but in the summer of 1895 all of the buildings were moved off of the right of way onto the land adjoining the right of way.

The acting Secretary of the Interior, in his decision in deciding the case against the probate judge, the contestant, and in favor of White, the decision upon which the patent was finally issued to White, the plaintiff, which opinion of the acting Secretary is attached to the

answer of the plaintiff to the cross complaint of the defendants, says:

> "Said lots were, it would seem, laid out by Nagel, supposing that the company's right of way only extended one hundred feet each way from the center of its track, and, while the back end of said lots extended about fifteen feet onto the land in controversy, about one hundred feet thereof was on the right of way and the buildings used and occupied as hereinbefore stated were on the right of way. The majority of those buildings were in 1894 and 1895 maved back off the right of way onto the land in controversy."
>
> (Transcript, p. 47.)

This was before Mr. White's entry in the Land Office, his entry not being made until November 27th, 1895.

At the close of the first hearing before the Land Office the contestant called the attention of the Register and Receiver to the township plat of the government survey covering the land in dispute, which showed upon its face that Clark's Fork station, together with a settlement of buildings, is situated thereon.

(Transcript, 233.)

From the foregoing statement of the facts as given in evidence, and which are not materially disputed in any particular, and from the foregoing opinion of the acting Secretary of the Interior, it is clear that the Land Department totally ignored the fact that White had claimed and possessed the land entirely south of the railroad track and not including any portion of the land in dispute

up to and until the time he made a homestead entry thereon, on November 27th, 1895. That prior to that time the buildings in the town, which had previously occupied a portion of the right of way of the railroad, were moved back off of the right of way upon lots entirely outside the right of way, and at the time of the trial in the Land Office the map of the public survey of that township was called to the attention of the Register and Receiver showing the townsite of Clark's Fork Station marked upon the map, one of the records of the Land Office and a matter of which they were bound to take judicial notice because it was a record of the public surveys of that land filed in that office for the guidance of the officers of the Land Department.

(See map Defendants' Exhibit 8, between pp. 270 and 271 Transcript.)

Notwithstanding the fact that the acting Secretary found that the buildings had been moved off of the right of way and upon the land in controversy long before White made his homestead entry; notwithstanding the fact that it was shown on the public map that a townsite existed thereon, the officers of the Land Office and the Land Department allowed White's entry and awarded him a patent for the land, including the buildings and improvements of the value of many thousands of dollars, placed thereon by the town occupants.

This, we contend, was directly and absolutely contrary

to law and was an erroneous decision of the law as applied to the facts and the records in the case and by this erroneous decision of the law the officers of the Land Department have given to Mr. White a title through the patent which in equity and good conscience and under the laws of the United States should have gone to the probate judge of Kootenai County, Idaho, to be held by him in trust for the benefit of the occupants of the town.

The case of Burfenning vs. Chicago, St. Paul, etc., Ry., 163 U. S. 321, was a case where a patent was issued to a piece of land within the limits of the incorporated town of Minneapolis, and the invalidity of this patent was alleged under the second clause of Section 2258 and Section 2289 of the Revised Statutes, by which are excluded from pre-emption and homestead lands included within the limits of any incorporated town, or selected as the site of a city or town. These are the same sections and subdivisions of sections relied upon by the defendants in the case at bar. The counsel for the plaintiff in error in that case insisted that the patentability of all public lands is one for the Land Department of the United States to determine, and that its determination in the case, evidenced by the issue of the patent, was conclusive upon the question that the lands were not at the time that the patentee's rights were initiated within the limits of any city and were subject to homestead. The contention of the plaintiff in error in that

case was precisely the same as the contention of the plaintiffs in the case at bar. That case is so nearly like the case at bar that we feel that it is proper to quote a large part of the opinion of Mr. Justice Brewer, from pages 323-324 and 325, as follows:

> "It has undoubtedly been affirmed over and over again that in the administration of the public land system of the United States, questions of fact are for the consideration and judgment of the Land Department, and that its judgment thereon is final. Whether, for instance, a certain tract is swamp land or not, saline land or not, mineral land or not, presents a question of fact not resting on record, dependent on oral testimony; and it cannot be doubted that the decision of the Land Department, one way or the other, in reference to these questions is conclusive and not open to relitigation in the courts, except in those cases of fraud, etc., which permit any determination to be re-examined. Johnson vs. Towsley, 13 Wall. 72; Smelting Company vs. Kemp, 104 U. S. 636; Steel vs. Smelting Company, 106 U. S. 447; Wright vs. Roseberry, 121 U. S. 488; Heath vs. Wallace, 138 U. S. 573; McCormick vs. Hayes, 159 U. S. 332.
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> "But it is also equally true that when by act of Congress a tract of land has been reserved from homestead and preemption, or dedicated to any special purpose, proceedings in the Land Department in defiance of such reservation or dedication, although culminating in a patent, transfer no title, and may be challenged in an action of law. In other words, the action of the Land Department cannot override the expressed will of Congress, or convey away public lands in disregard or defiance thereof. Smelting Co. vs. Kemp, 104 U. S. 636-646; Wright vs. Roseberry, 121 U. S. 488, 519; Doolan vs. Carr, 125 U. S. 618; Davis's Admr. vs. Weibbold, 139 U. S. 507, 529; Knight vs. U. S. Land Ass'n, 142 U. S. 161.
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> "The case of Morton vs. Nebraska, 21 Wall. 660,

is very closely in point. In that case the plaintiff held a patent for lands in Nebraska which were saline lands, and noted as such on the field books, although the notes thereof had not been trasferred to the register's general plats. The preemption act of September 4, 1841, c. 16, 5 Stat. 453, 456, declared that 'no lands on which are situated any known salines or mines shall be liable to entry.' Notwithstanding this prohibition patents were issued for the lands, and it was held that they were absolutely void, the court saying, p. 674: 'It does not strengthen the case of the plaintiffs that they obtained certificates of entry, and that patents were subsequently issued on these certificates. It has been repeatdly decided by this Court that patents for lands which have been previously granted, reserved from sale, or appropriated, are void. The executive officers had no authority to issue a patent for the lands in controversy, because they were not subject to entry, having been previously reserved, and the want of power may be proved by a defendant in an action of law.'

"In that case it will be observed that the records disclosed that the lands were saline lands when the proceedings in the Land Department were had. So the case was not one in which the Department determined a fact upon parol evidence, but one in which it acted in disregard of an established and recorded fact. In Root vs. Shields, 1 Woolworth 340, decided by Mr. Justice Miller, at the circuit, it was held that a patent for lands within the limits of the City of Omaha was void. It is true that case was one in equity and not in law, but so far as respects the decision that the patent was void, it is exactly in point.

"Now, applying these authorities to the case at bar, the City of Minneapolis was incorporated by an act of the legislature of that state, declared in its terms to be a public act, which took effect on March 8, 1881. The record of the Land Department shows that the right of the patentee was initiated on March 27, 1883, for on that date he made

his application to enter the lands. This is not a case in which the patent was founded upon actual occupancy for homestead purposes, or in which nothing appearing but the patent itself there might be uncertainty as to the time at which the patentee's rights were initiated—whether before or after the incorporation of the city. It is one where, affirmatively and by the record, it is disclosed that there was no pretence or semblance of claim on the part of the patentee until two years subsequent to the organization of the city, and in that respect differs from Texas & Pacific Railway v. Smith, 159 U. S. 66, in which, on account of the absence of all testimony, there was suggested an uncertainty as to the time at which, by way of relation, the patentee's rights took effect. The case, therefore, comes within the general rule announced as to the invalidity of a patent issued in defiance of the expressed will of Congress."

The case at bar cannot well be distinguished from that case. The officers of the Land Department, including the acting Secretary of the Interior, found as a matter of fact from the evidence that the buildings had been moved from the railroad right of way onto the land in controversy in 1894 and 1895, and for that reason alone, the land was not at the time of White's entry, on November 27th, 1895, subject to either pre-emption or homestead entry. Again, the record in this case, viz: the map of the public surveys for that township, had been exhibited to the officers of the Land Department on the trial, and that map showed on its face that the townsite of Clark's Fork existed thereon at the time of the survey in the field. In that respect it is identical with the case of Morton vs. Nebraska, 21 Wall. 660, cited by Mr.

Justice Brewer in his opinion. In that case the fact that the lands were saline lands was noted as such on the field books, although the notes thereof had not been transferred to the Register General's plats. In the case at bar they had been transferred from the notes onto the plats, and the town or station of Clark's Fork was noted thereon. In the case at bar there was not only a finding of the officers of the Land Department that the land was occupied as a townsite, but the official record in the Land Office, viz: the map or plat, showed the existence of a town at the time of the survey. How, then, under the laws of the United States, could the Land Department direct or authorize a patent to issue to the plaintiff White, without such decision being erroneous and contrary to the law. If the patent was issued under an erroneous construction of the law as applied to the facts, then the patent under that decision would be absolutely void. The Court might under that decision hold that the patent in the case at bar to the plaintiff White was null and void, but we believe that equity and justice would be better subserved by directing and compelling the plaintiff to convey the lands to the defendants or to the probate judge of Kootenai County, in trust for the defendants, upon payment of the actual cost paid by the plaintiff to acquire the title to so much of the land as should be conveyed. This will leave the plaintiff all improvements that he ever put upon any of the lands. It will take nothing from him, and such a decision will

prevent a great injustice. It will prevent him from acquiring title to the lands cleared by the defendants, also from obtaining a title to their buildings and their homes, toward the construction of which the plaintiff never contributed a single cent.

We believe that the laws of Congress prohibiting the acquiring of title by pre-emption and homesteads to lands included within the limits of an incorporated city or town, or within the limits of land selected as a site for a city or town, and to lands occupied for the purposes of business and trade and not for agriculture, were framed with a view to protecting the townsite settlers on the public lands from just the kind of a claim that the plaintiffs assert in this case. In the language of Mr. Justice Miller in the case of Atherton vs. Fowler, 96 U. S., at page 519, he says:

> "Does the policy of the preemption law authorize a stranger to thrust these men out of their homes, seize their houses, and settle exactly where they were settled, and by these acts acquire the initiatory right of preemption? The generosity by which Congress gave settlers the right of preemption was not intended to give him the benefit of another man's labor, and authorize him to turn that man and his family out of their home. * * * The right to make a settlement was to be exercised on unsettled lands; to make improvements on unimproved land. To erect a dwelling house did not mean to seize some other man's dwelling. It had reference to vacant land, to unimproved land."

Congress undoubtedly recognized that in the settle-

ment of the public lands of the United States, that towns on the public lands would naturally grow up; that portions of the public lands would be occupied and used for purposes of business and trade, and not for agriculture; and for that reason it prohibited the entry by preemption or homestead of any lands within the limits of the amount of land that might be patented for such towns for the benefit of the occupants. It did not propose to allow a preemption or homestead settler to acquire a title by preemption or homestead to any lands within those limits; therefore it positively prohibited it.

In this case we believe and urge that, even if all of the buildings of this town of Clark's Fork had been within the limits of the right of way of the Northern Pacific railroad, still it would be a town in one sense of the word upon the public lands. Supposing Mr. White's house, in which he resided upon this land, had been within the limits of the right of way of the Northern Pacific railway, would that fact have precluded him from obtaining a title to his 160 acres as a preemption claim? His residence would be within the limits of it, and if the Northern Pacific Railway Company should at any time abandon its right of way, the right of way would revert back and pass to him, as much so as if the railroad had never existed. So we contend also that if there was a settlement in the nature of a town, even though within the limits of the railroad right of way,

that the law did not allow a preemption or a homestead settler to obtain a title to all the lands surrounding it, and bottle the people up and fence them in, if he chose to do so. Here was a government postoffice, hotels, stores and other places of business and residences, and a public railroad station, and the lots that were at first occupied were partly on the right of way and partly off certainly belonged to the occupants, although they may have been trespassers upon the railroad right of way. The plaintiff himself first went to the town as the agent for the Northern Pacific Railway Company at this station, and when he built his house he was but one of many other settlers at that place. He took up and marked out, and recorded in the County Recorder's office, the claim which he intended to take, that included none of the land occupied by the others, and we contend that he could not under those circumstances afterwards, and when the land should be surveyed, change his boundaries so as to take in land that was then already occupied by other people for purposes of business and trade and for townsite purposes, and acquire title thereto under the preemption or homestead laws, and thus acquire title to the homes and places of business of his neighbors. Such a proceeding would certainly shock the moral sense of the men in Congress who passed those laws, if they thought they had authorized it.

We confidently believe that this Court will not permit

any such practice, and that this Court ought to render a judgment holding that the plaintiff is a trustee for the benefit of the occupants of the land occupied by the defendants, and that a judgment be entered compelling him to convey to the defendants, or to the Probate Judge in trust for them, all of the Northwest Quarter of the Southwest Quarter (N. W. ¼ of S. W. ¼) of Section Two (2), lying north of the Northern Pacific railroad track, and all of that forty acres lying south of the railroad track and west of the county road.

Respectfully submitted,

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